2009

Parker Jensen, Barbara and Daren Jensen v. Kari Cunningham, Richard Anderson, Lars M Wagner, Karen H. Albritton, and Susan Eisenman : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

PARKER JENSEN, a minor, by and through his parents and natural guardians, BARBARA and DAREN JENSEN; BARBARA JENSEN, individually; and DAREN JENSEN, individually, Appellants, vs. KARI CUNNINGHAM, in her individual capacity; RICHARD ANDERSON, in his individual and official capacities; LARS M. WAGNER, in his individual capacity; KAREN H. ALBRITTON, in her individual capacity; SUSAN EISENMAN, in her individual capacity, Appellees.	Case No. 20090277-SC

APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT
HON. JOSEPH C. FRATTO, JR.
THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

BRIEF OF APPELLANTS

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LIST OF PARTIES TO THE PROCEEDINGS

All interested parties are identified in the caption on appeal.

When the case was initially filed, Intermountain Health Care (IHC) was a named defendant. However, upon stipulation of the parties that none of the defendants was an IHC employee, IHC was voluntarily dismissed from the case, and is not part of the case or this appeal. Three other original defendants, the State of Utah, Dr. Cheryl Coffin, and Dr. David Corwin, were dismissed from the proceeding by U. S. District Court Judge Paul Cassell. That dismissal has not been challenged by the Jensens, and those parties are not part of the case or this appeal.

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JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in ruling that there is no historical or textual basis for interpreting the Utah Constitution differently than the federal constitution? Interpretation of the Utah Constitution is a question of law reviewed for correctness. *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 17, 73 P.3d 325. This issue was preserved in the Jensens' opposition to the defendants' motions for summary judgment. (R. 1271.)

2. Did the trial court otherwise err in ruling that the federal court's ruling was res judicata as to the Jensens' state law claims? Whether res judicata bars an action presents a question of law reviewed for correctness. *Mack v. Utah State Dept. of Comm.*, 2009 UT 47, ¶ 26, --- P.3d ---. This issue was preserved in the Jensens' opposition to the defendants' motion for summary judgment. (R. 1271.)

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

> Utah Constitution, Art. I, § 1 – "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right."
>
> Utah Constitution, Art. I, § 7 – "No person shall be deprived of life, liberty or property, without due process of law."
>
> Utah Constitution, Art. I, § 14 – "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized."

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

On July 18, 2005, the Jensens filed an action asserting violations of the Utah and United States constitutions, wrongful initiation of process, and intentional infliction of emotional distress. (R. 1-70.) The defendants removed the action to federal court based upon the presence of the federal constitutional claims. (R. 106-108.)

On September 22, 2008, U. S. District Court Judge Ted Stewart granted summary judgment to all remaining defendants on the federal constitutional claims. (*See* Add. Exh. 3 (Memorandum Decision); *see also* R. 117-188.) That ruling is currently on appeal.

The federal court declined to exercise jurisdiction over the Jensens' state law claims, stating that "as [the Jensens'] Utah constitutional claims present important questions of state law, the Court declines to further exercise supplemental jurisdiction over the state law claims and will remand them to the Third Judicial District Court for Salt Lake County, State of Utah, from which this case was removed." *Id.*, p. 62.

On remand, the defendants filed motions for summary judgment on varying grounds. (R. 281, 947, 1012, 1089.) The trial court granted summary judgment to all defendants on the grounds that the federal court's dismissal of the federal claims was res judicata as to all of the Jensens' state law claims. (R. 4199; see Addendum Exhs. 1 and 2.) The Jensens timely appealed. (R. 4211.)

Statement of Facts[1]

The record includes the following evidence and reasonable inferences therefrom:

On April 30, 2003, Barbara Jensen of Sandy, Utah, took her son Parker to an oral surgeon to remove a small growth under Parker's tongue that the family dentist had diagnosed as a clogged saliva duct ten months earlier. (R. 2332-2334, 3278-79, 3283.)

The oral surgeon also diagnosed the growth as a clogged saliva duct, but sent a sample to LabCorp for testing per standard procedure. (R. 1711-12, 3275-76.) He subsequently received a call from a LabCorp doctor who said the sample was malignant, but he was "not sure of the cell type." (R. 1713-14, 3287.) LabCorp later issued a report stating a diagnosis of "poorly differentiated small round blue cell tumor." (R. 3285-86.) That diagnosis could encompass up to 40 different tumor types, for which treatments vary. (R. 1756, 2688-89, 2737, 2791, 3192.) It is critical to make an accurate diagnosis of a patient's cancer type, both for treatment and prognosis. (R. 2738, 3199, 3210.)

The oral surgeon told the Jensens about the call, and said he had arranged for them to see an ear, nose & throat specialist (Dr. Muntz) at Primary Children's Medical Center. (R. 2334-35, 1715.) Dr. Muntz noted that the tumor type was unknown, writing: "The unusual presentation and slow growth of this makes me less concerned re: rhabdomyosarcoma but such tumors as alveolar soft part sarcoma and leiomyosarcoma, etc are possibilities." (R. 2335, 3320.) He referred the Jensens to the oncology

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[1] In the federal court, the defendants' statements of fact totalled 194 pages; the Jensens submitted an additional 139 pages. Accordingly, this summary is significantly truncated. A full chronology is at R. 1130-1270.

department, where they met with defendant Lars Wagner, an assistant professor of pediatrics at the University of Utah. (R. 2336, 3147-48.) Wagner said he couldn't really do anything until he had his own facility's pathology report. (R. 2122, 3212-13.)

The pathologist on the case, Dr. Lowichik, began receiving unusually frequent phone calls from Wagner about Parker's case. (R. 2801-07.) Lowichik was not prepared to state definitely that the tumor was Ewing's, but she "did [her] best" to put it into a category. (R. 2793-95.) On May 20, 2003, she wrote that, from her examination, the results "suggest[ed] a diagnosis of Ewing's Sarcoma." (R. 2793-94, 2804, 3352-53.)

A number of factors militated against a finding of Ewing's, including:

- Only about 1 percent of all cancers are pediatric, of which Ewing's comprises only 3-5 percent. (R. 3269-70.)

- 80-90 percent of Ewing's patients have primary tumors in the bone, not soft tissue, and of the latter, most are in the deep soft tissue. (R. 2079-85, 3270.) Parker's growth was in the superficial soft tissue. (R. 2079-80, 2776, 3112.) Ewing's in the mouth would be even rarer. (R. 1520-21, 1790-91, 2078-79, 2808, 3259.)

- Ewing's is aggressive and fast-growing; Parker's was slow growing. (R. 1516, 1795, 2706-07, 3062, 3074, 3077.)

Lowichik's May 20 report stated: "DIAGNOSIS: SOFT TISSUE UNDER TONGUE, BIOPSY; EWING SARCOMA / PERIPHERAL PRIMITIVE NEUROECTODERMAL TUMOR (SEE COMMENT)." (Ewing's is often referred to as Primitive Neuroectodermal Tumor ("PNET") when located in the soft tissue. (R. 1521, 1751-52, 2047-48, 2092-2093.)) The "Comment" said, "In the event of excision of additional lesional tissue from this site, cytogenetic studies and freezing of tissue for possible molecular ancillary studies may be informative." (R 3352-53.)

The Jensens were informed that Parker had Ewing's Sarcoma. A "margin" (removal of remaining malignant tissue with a margin of clean cells) was scheduled, but later canceled. (R. 2123-24, 2340, 2383-84.) The Jensens were told that chemotherapy would begin the following Tuesday (R. 2125), and began preparing for the upcoming ordeal. Barbara's brother moved in from Idaho to tend the other children, and they planned structural changes to their house. (R. 2125, 2296, 2307-08, 2611-12, 3278-79.)

Wagner said that Parker needed to begin chemotherapy immediately, that "we had two weeks because it was so aggressive." (R. 2166-67, 2340, 2415-16, 2650-51.) The Jensens asked if there were any other tests that would help confirm the diagnosis of Ewing's. Wagner said no. (R. 2150.) That statement was false. Wagner knew that:

- Cytogenetic and molecular testing, which had not been done, were reliable diagnostic tests for Ewing's (R. 1501-02, 3360), were routinely performed at PCMC in cases of suspected Ewing's (R. 1500, 1758-60, 2730-33, 2798, 3167-68, 3208, 3170, 3210-11), and were inexpensive. (R. 1792, 2799.)[2]

- The only testing that had been done (immunohistochemical) cannot definitively diagnose Ewing's, as markers indicative of Ewing's can also manifest with other things, including healthy tissue. (R. 1752, 2058, 2807, 3203-4, 3153, 3166.) Immunohistochemical testing also cannot detect an 11;22 translocation. (R. 2060.)

Wagner later testified that he declined to request genetic or molecular testing because it was not necessary and was not technically required by a Clinical Trial (AEWS0031) of which Wagner was a co-investigator. (R. 3164-65, 3180.) Although the

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[2] Cytogenetic/molecular testing looks for a chromosomal translocation in which a specific gene (FLI1) within chromosome 11 has moved to chromosome 22, and a specific gene (EWS) within chromosome 22 has moved to chromosome 11. This "11;22 translocation" is found in 85-95 percent of Ewing's patients. (R. 2668, 3207, 3374.)

Clinical Trial says it "should NOT be used to direct the practice of medicine by any person or to provide individualized medical care, treatment, or advice to any patient or study subject" (emphasis in original), Wagner says that his handling of Parker's case was pursuant to the AEWS0031 protocol. (R. 3180-3184; Case No. 2:05-cv-00739, Doc. 18 (Wagner Mem. Supp. Motion to Dismiss, November 22, 2005, p. 15 ¶ 38).)

The AEWS0031 Clinical Trial was for patients with newly diagnosed Ewing's that had not metastasized (spread). (R. 3372.) Very few patients present with newly diagnosed, localized Ewing's. (R. 1485, 2734-35, 2738, 3262.) If Wagner wanted to enroll Parker in the AEWS0031 Trial, he had to do so within 30 days of the "diagnostic biopsy." (R. 0515, Ex. 65, p. 17.) Wagner calendared the date of biopsy as May 2. (R. 3378-79, 3382.) However, a medical article cited by Wagner measured the deadline from the date of diagnosis, which would have been May 20. (R. 3386.)

The AEWS0031 Trial "strongly recommended" molecular testing to confirm Ewing's. (R. 3375.) Genetic/molecular testing was a reasonable request, and would have been performed had Wagner requested it. (R. 1537-40, 2781-82, 2815.) Defendant Albritton is unaware of anyone at PCMC ever refusing such testing. (R. 1539-40.)

Wagner claims that a pathologist, Cheryl Coffin, told him that genetic/molecular testing was not necessary. However, Coffin testified that she considers such testing "incredibly useful," would not have been opposed if it had been requested, does not know why genetic/molecular testing was not done on Parker's tissue, and is not aware of anyone who was opposed to such testing. (R. 1774-75, 1770, 1793.)

Removing additional tissue from Parker's mouth (an "oncologic" excision) to

obtain a new sample would also have alleviated a concern of Albritton's, which was that there were still tumor cells in Parker's mouth. Wagner falsely told Albritton that he had recommended an oncologic procedure to the Jensens. (R. 1503-1506.) However, when the Jensens asked about the originally scheduled margin, Wagner told them that, rather than removing the remaining tumor from Parker's mouth immediately, a second surgery would not be performed until after twelve weeks of chemotherapy (which was a requirement of the AEWS0031 Clinical Trial protocol). (R. 2135-36, 2353-54.)

The Jensens were confused. They had read that the first thing to do with cancer is get all of the cancerous material out. (R. 2645-46.) Dr. Albritton testified that it is important to get all of the tumor out as soon as possible; she cannot think of any good reason to leave part of it in. (R. 1528-29.)

Barbara Jensen again asked Wagner if there was any other test that would help confirm the diagnosis of Ewing's, and he said no. (R. 2154-55.) At this point, all other tests (x-rays, CT and bone scans, blood tests, MRI) had come back normal. (R. 0515 (Ex. 12, pp. 49-61), 2131, 2376-78, 3275-76, 3278-79, 3318-20, 3325.)

Another of Barbara's brothers referred the Jensens to a cancer specialist he knew in Oklahoma. This doctor told the Jensens that the staging process for Ewing's would include blood tests, x-rays, bone, CT, and PET scans, MRIs, and other tests like genetic tests. (R. 2125-26, 2152-53, 2342-43, 2345, 2482, 2645-46.) The Jensens told Wagner they wanted all the tests that this doctor mentioned and that they saw on the National Cancer Institute and other websites, which included genetic testing. (R. 2361-62.)

Wagner now claims that he did not know that the Jensens were questioning the

diagnosis, or he would have requested genetic/molecular testing. (R. 3237-38.) However, on May 21, 2003, the Jensens had asked Wagner to send a "blind" sample to Harvard University for testing, which Wagner admits was because they had a question about the diagnosis. (R. 2306, 2365-67, 3239.)

Wagner sent Parker's slides to a pathologist at Harvard who was a fellow investigator for the AEWS0031 Clinical Trial (R. 3373, 3239). Instead of the blind second opinion the Jensens requested, however, Wagner sent an e-mail denigrating their request for a second opinion, and urging the pathologist to agree with the "confident" diagnosis by his "expert" pathologist as quickly as possible. He alerted his co-investigator that "the child was now 19 days post resection." (R. 3427-28.) Wagner also said that he did not want to "slow things down" by submitting a claim to the Jensens' insurer, and that the Jensens had agreed to pay for the testing personally. (R. 3428.)

Upon learning that Wagner had not honored their request for a blind second opinion, the Jensens decided to have the testing performed elsewhere. They did not have confidence that Wagner would obtain a truly independent opinion. (R. 2370-71, 2626.) The Jensens had believed the initial testing, but were starting to wonder both about the diagnosis and Wagner's insistence on immediate chemotherapy. Some red flags:

- The Jensens could find no reported cases of Ewing's in the mouth (R. 2164);
- The survival rates quoted by Wagner kept changing as he urged them to start chemotherapy (70, then 85, then 90 percent) (R. 2239-40, 2356, 2392-93, 2605-06), and Wagner seemed irritated by legitimate questions, such as why Parker would need 45 weeks of chemotherapy if another biopsy at twelve weeks came back negative (R. 2357-58);
- Wagner had given them the names of the chemotherapy drugs that would be used

by writing them on a napkin (R. 2400);

- A margin had been scheduled and then canceled, which seemed inconsistent with application of a standard procedure (R. 2124);
- Leaving a deadly tumor in Parker's mouth for another three months seemed counterintuitive (R. 2645-46);
- Wagner insisted that Parker must be experiencing eating and sleeping difficulties and losing weight, which the Jensens told him was not happening (R. 2378-79);
- The Jensens asked Wagner about Lowichik's comment that "cytogenetic" testing might be informative, but Wagner said it was unnecessary and did not explain why (R. 2372-75, 2395-96).

On May 28, 2003, the Jensens consulted with Dr. Judith Moore, a family doctor at the Modern Health Clinic in Bountiful that had successfully treated Barbara's father for prostate cancer. (R. 2225-26.) The Jensens told Moore that, if they had an objective confirmation of Parker's diagnosis, they would agree to chemotherapy. (R. 2960-61.) From Parker's records and the length of time involved, Moore told the Jensens that she was not convinced that Parker had Ewing's. (R. 1695, 2486, 2952-56, 2961.)

The Clinic's treatment of Barbara's father had been with a form of chemotherapy called Insulin Potentiation Therapy (IPT). (R. 2165, 2225-26.) The Jensens asked whether IPT might be a potential treatment if Parker had Ewing's, and requested information to take to their oncologist. (R. 1691, 1693-94, 1700-01.) At a May 29, 2003, meeting, the Jensens asked Wagner to "look into" IPT. (R. 2139-41, 3395.)

At the meeting, Barbara said, "There's got to be another test that can narrow it down more than just maybe or invisible." Wagner said there was not. (R. 2150, 2183-85.) Moore had recommended a PET scan, which Wagner admits are positive in most

patients with Ewing's, but Wagner refused the request. (R. 2380-81, 2947-48, 3218-20.)[3]

Daren expressed concern that treatment would not be effective unless the cancer were definitively identified, and said it seemed odd that the exact same treatment would be given to Parker as to someone with a large tumor in his leg. (R. 3395.) Daren's instincts were correct. Several years earlier, superficial soft tissue Ewing's had been identified as a prognostically favorable subset in which chemotherapy is not always administered. (R. 2080-83.) Parker's growth was superficial and in the squamous epithelium (the tissue beneath the tongue, essentially a form of skin). (R. 2049-50, 2063-65.)

Since the LabCorp and PCMC reports did not state the same diagnosis, the Jensens asked Wagner to test another sample from Parker's mouth, but Wagner refused. (R. 2401-02.) His response "floored" the Jensens, who thought, "why wouldn't you do additional testing, even if it was just as a safety point[?]" (R. 2577-78.) Daren explained that he was "just trying to get enough information so I can determine how to proceed with Parker." Wagner interrupted, "You don't have the decision on how we treat Parker. You can be a part of the decision." (R. 2402-03.)

Wagner told pathologist Lowichik that the Jensens had given him an article about IPT in which a Ewing's patient had gotten better. Rather than show her the article, Wagner told her that the article was quite old and that immunohistochemistry had not

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[3] Moore then prescribed the PET scan, the results of which were normal. (R. 2947-48, 3525.) The PET scan did not show cancer in Parker's mouth, where the cancer cells supposedly were located. (R. 2965-66.)

been performed. He asked Lowichik to speculate, without reading it, on whether the patient in the article might not have had Ewing's. (R. 2801.)

On June 2, 2003, a social worker working with Wagner called defendant Kari Cunningham, a DCFS case worker, with a "heads up" that DCFS might become involved. (R. 1873.) On June 5, Wagner called Daren, who was out of town, and demanded that he come in. Wagner said that if he did not, Wagner would "take his child" in "three days." (R. 2405-06.) A meeting was scheduled for June 9. (R. 0515 (Ex. 15, p. 20); 2410-11.)

At the meeting, the Jensens again asked if a new sample could be taken and tested, but the request was refused. (R. 2417, 2422-23.) According to Wagner's notes, the Jensens were asked about their plans regarding IPT, and "[f]ather indicated that he was still reviewing this information." (R. 2644, 3408.) The Jensens complained that PCMC was jumping into treatment when they were still asking about the diagnosis. (R. 2161.)

A PCMC risk management employee in attendance then "leaned forward in her chair like she was picking up a card off the table and showed it to us like this." She said she didn't want to, but "I have a card to play." She said she could report the Jensens to DCFS and "have your child in three days." The Jensens replied, "We're going to go find another hospital that will work with us. You're fired." (R. 2156-57, 2162, 2412.)

On June 12, Wagner went to DCFS liaison Dr. David Corwin, reporting, "patient with Ewing's sarcoma; family refusing conventional therapy and seeking unproven alternative treatment methods." (R. 3378-79, 3396, 1810-11.) Wagner did not disclose that the Jensens were seeking confirmation of Parker's diagnosis. *Id.*

Dr. Corwin called Daren Jensen, who expressed concern about Wagner's refusal to

run additional tests before starting chemotherapy. Daren stated that the Jensens had not decided that IPT was a solution for Parker, and mentioned that they were planning a margin to remove the surrounding tissue. (R. 1815, 1825, 2426-28, 2639.)

Daren agreed to another meeting. Dr. Corwin said he was going out of town for a few days, so a meeting was set for his return on Friday, which meeting it was believed Dr. Moore might attend. Corwin knew that the Jensens had confidence in Moore. (R. 1823-24, 1829, 1833, 2429, 2440.) Corwin told Wagner about the meeting, but Wagner said they could not wait that long. Corwin asked, "How much difference does a few days make?" but Wagner said it was "urgent." (R. 1824-1830.) Corwin told Wagner that the Jensens were planning another resection of the tumor, which made sense to Corwin, but Wagner said no, it should be left in. (R. 1826-27.) Corwin assumed that, if other diagnostic tests were available that had not been run, Wagner would have told him. (R. 1819-1820.) At Wagner's insistence, Corwin called Daren Jensen and canceled the meeting, stating that the Jensens would be reported to DCFS instead. (R. 2429.)

Meanwhile, Wagner falsely told his supervisor that he had provided all information he could to the family regarding the diagnosis, and that the Jensens had not given him any material on IPT. (R. 2754-55, 2760.) Wagner further said that Daren Jensen had canceled the meeting, and that "there were no further opportunities to meet with the Jensens[.]" (R. 2758-59, 2763, 2765.) Wagner also claimed to have discussed numerous other things with the Jensens that he had not. (R. 2743-48, 2751-53.)

At a June 16, 2003, meeting, Wagner presented a "case summary" to DCFS that contained several material misrepresentations and omissions, including:

- that the May 20 biopsy results "confirmed" Ewing's, when Wagner knew that immunohistochemical staining cannot definitively diagnose Ewing's;

- that "[t]he Jensens requested a second opinion of the sample from Dana Farber Clinic at Harvard University. Dr. Wagner agreed to this, and the sample was sent to Boston," omitting that the sample was never tested at Dana-Farber, that he had denied a blind test, and that he had attempted to influence the outcome of the test;

- that "On May 21, 2003, Parker underwent a CT and bone scan," omitting that the results were normal;

- that "On May 29, 2003, Mr. and Ms. Jensen told Dr. Wagner that they wanted to use Insulin Potentiation Therapy as an alternative to chemotherapy," which was contrary to PCMC's own notes that the parents only asked Wagner to "look into" IPT, and also that "IPT therapy was listed on a website called Quackwatch," which he knew was untrue (R. 3395, 3398);

- that at the June 9 meeting, Wagner "asked the family if any more information would be helpful. The family declined." when the Jensens had in fact asked for testing of a new sample and been refused;

- that the Jensens had refused to meet again, when it was Wagner who refused.

Based upon Wagner's report, a referral was made to DCFS on June 16, 2003, and assigned to defendant Kari Cunningham, whose office was in a hallway at PCMC. (R. 1887-90, 2763-64, 3411). Cunningham did not want to be a social worker, and did not like doing investigations. (R. 1852, 1857-59.) She considered her workload too high, and the first thing she did with the Jensen case was unsuccessfully try to get another DCFS office to handle it. (R. 1859-60, 1865-68, 1899-1900.)

Cunningham knew that it was her duty to investigate Wagner's allegation of medical neglect, and that the office of the Guardian ad Litem (GAL) would rely in part on her investigation. (R. 1557-58, 1560-61, 1862-64, 1869, 1960-62.) Instead, she simply assumed Wagner's allegations to be true and performed no investigation at all. (R. 1875-

76, 1891, 1893-97, 1906-09, 1922-1927.) Although state law required Cunningham to contact the alleged victim's parents (R. 3431), she decided not to contact the Jensens, and instead to get their side of the story entirely from the person who was reporting them. (R. 1903-05) Cunningham took the position that, if a doctor's complaint seemed reasonable to her, she would not investigate it. She never once ran a medical neglect allegation past another doctor. (R. 1863, 1870-71, 1874-75.)

Cunningham never contacted Dr. Moore or considered letting the Jensens rely on her recommendations because Wagner said that Moore was not qualified to treat Parker. (R. 1883-84, 1913-14.) Wagner said it was an emergency, and that Cunningham needed to do something within days. (R. 1879-80.) He did not disclose that Parker's parents were questioning the diagnosis and had requested additional diagnostic tests, which Cunningham would have considered important. (R. 1879, 1881.) Wagner gave Cunningham the impression that he had done everything he could do diagnostically; he never mentioned the availability of genetic or molecular testing. (R. 1904-05, 1910-11.)

On June 17, 2003, Cunningham signed under oath a Verified Petition and Motion to Transfer Custody and Guardianship. (R. 3435-39.) The verified petition contained several factual misrepresentations, *e.g.,* that the Jensens had "indicated their intent to use IPT" when the Jensens had said they were reviewing the possibility; that "Dr. David Corwin was consulted for an independent assessment," when Cunningham knew that Corwin was a psychiatrist consulted in connection with reporting the Jensens to DCFS, not for an "independent assessment" of Parker's medical condition; and that "the father [Daren]" canceled the Friday meeting, when it was Wagner. (R. 3435-39.) The petition

also omitted material facts, including that she had not conducted any investigation; that the parents were questioning the diagnosis, that confirmatory tests had not been run, and that, if Parker did have Ewing's, it was a very unusual form. (R. 3435-39.)

DCFS filed a Motion for Expedited Hearing, specifying a hearing date of June 20, 2003. (R. 0515 (Ex. 10, pp. 0007-16).) The filings were dated June 17, but were not filed or served until June 18, *id.*, so the "three days" Wagner had touted turned out to be two.[4]

At about this time, Wagner e-mailed Cunningham a page from *Principles and Practice of Pediatric Oncology* by Pizzo and Poplack, "the primary pediatric solid tumor textbook," that discussed chemotherapy. (R. 2687, 2741-42, 3188-90.) Wagner omitted pages that said that "molecular diagnosis has become the gold standard" for diagnosing Ewing's, that an 11;22 translocation was definitive, and that repeatedly emphasized the superiority of genetic/molecular testing to confirm a Ewing's diagnosis. (R. 3358-63.)

Meanwhile, the Jensens scrambled to find an attorney. (R. 2329a-30.) Eventually, they found Frank Mylar, a former Assistant A.G. who had served as general counsel to the Utah Department of Health and to the Department of Corrections. (R. 3505-06.)

A friend told the Jensens that he had a connection with a cancer specialist in Vienna, Dr. Jeorg Birkmayer, whose resume said he had received a medical degree from

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[4] The timing of the two-day hearing might not be coincidental. If the enrollment deadline were measured from the date of diagnosis, as in the *New England Journal of Medicine* article, Day 30 would have been June 20, 2003, which might explain why Wagner told Corwin he could not wait three days to meet with the Jensens on June 20 even though Corwin wanted to; why the DCFS filings were backdated so that the "three day" hearing could be held on June 20; and why Wagner told Cunningham at the June 16 staffing that Parker could be dead in "five days."

the University of Munich, served as a visiting research fellow at several American universities and head of the Division of Tumor Oncology at the University of Munich, and was a member of the American Association of Cancer Research. (R. 3366.)

The Jensens faxed Parker's medical records to Dr. Birkmayer, who told them he questioned whether Parker had cancer. (R. 2170-71, 2485.) Birkmayer agreed to perform an independent evaluation, including new tests on the slides. (R. 2603-04.) Anticipating the consultation, the Jensens applied for a passport for Parker. (R. 3278-79, 3678.)

The Jensens also called the oral surgeon's office to schedule the margin. (R. 2434.) The surgeon immediately called Dr. Muntz, who said he did not object to repeating a biopsy. Muntz said that the Jensens were refusing chemotherapy, and asked the surgeon to encourage them to begin treatment. (R. 1717-19, 1721, 3288.)

The oral surgeon understood that the Jensens wanted "an objective second opinion," which seemed reasonable to him. (R. 1735-36, 1718.) However, instead of honoring the Jensens' request for a blind second opinion, he called a close friend pathologist at the University of Washington, who agreed to "help out." (R. 1705-06, 1724, 1740-44, 2117-18.) The surgeon mailed the new sample to his friend, underlining "Ewing's" as a reminder. (R. 1729, 3585.)

Upon receiving the sample, the surgeon's friend called LabCorp to get their earlier results, ran a few tests that are facially inadequate to diagnose Ewing's, got a copy of Dr. Lowichik's report, wrote a report stating that a finding of a non-specific antigen (CD 99) "supported" the diagnosis (omitting the results of one key test that apparently turned out negative), signed her name and the name of another pathologist who had no involvement,

and sent the report to the surgeon. (R. 0515 (Ex. 38), 2066-2070, 2075, 3291-93.)[5]

On June 19, the Jensens and their attorney consulted a doctor at LDS Hospital who told them that "he found no present evidence of Ewing's Sarcoma or any other cancer but that he was uncomfortable second-guessing the doctors at Primary." (R. 2494-95, 3508-09.) He predicted that the second pathology review might change the diagnosis, but that it would still be in the same "category" as Ewing's. (R. 3073-74.)

The Jensens appeared in juvenile court the next day. Representing DCFS was defendant Assistant A.G. Susan Eisenman (R. 1962-64), who assumed that Cunningham had performed the statutorily prescribed investigation. (R. 1960-62, 2030.) At the June 20 hearing, Mylar indicated that the Jensens were obtaining "further tests on the actual sample" (R. 0515, Ex. 33a, pp. 5-6). The juvenile court continued the case until July 10 in the hope that the parties would reach a resolution. (R. 3454-55.)

On June 23, 2003, Dr. Birkmayer sent Eisenman a letter stating that he had reviewed Parker's records and would be assuming care of Parker, giving a brief overview of his credentials and experience. (R. 3529.) Eisenman knew that Birkmayer's letter raised doubt about the diagnosis, and that the Jensens wanted confirmation of the diagnosis before beginning treatment. (R. 1994, 3459, 3506, 3509-10.)

On June 25, 2003, Daren called the oral surgeon to ask about the test results from

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[5] The UW pathologist later received a request from a hospital for the second sample, but did not release it. That same day, she removed the uninvolved doctor's name from her report. (R. 3084-85, 3099-3100, 3602-04.) A later effort by a Boise doctor to get the second sample from this pathologist also proved unfruitful. (R. 2713.)

UW. During the call, Christensen admitted that he had told the UW pathologist about the prior diagnosis, which frustrated Daren and Barbara. (R. 1740, 2119.)

Upon reviewing the UW report, Dr. Birkmayer told the Jensens, "What is going on over there? CD 99 is not definitive of Ewing's Sarcoma." (R. 2116, 2450, 2633.) Dr. Moore likewise reaffirmed her doubt as to whether Parker had Ewing's. (R. 2633, 2944-46, 2957-59, 2962.) However, Moore indicated that she was not interested in getting involved in a court case. (R. 2144-45, 2221-23, 2620-23, 2556-57.)

On July 2, 2003, defendant Eisenman e-mailed Dr. Birkmayer, inquiring whether the Jensens were planning on traveling to Vienna, asking for the name of doctors with whom he usually consulted in the United States, and asking if he was certified to practice in the United States. Eisenman cited some studies associated with his clinic that she had found on the internet and asked if he intended to employ the same treatment for Parker. She stated that the American Academy of Pediatrics had established a standard of care for pediatric cancer patients in the United States, asked whether there was something similar in Austria, and requested a copy. She asked Birkmayer for information concerning his clinical experience and experience with child patients. (R. 1990, 3535.)

Eisenman knew that the AAP guidelines, which did not come from Wagner or the guardian ad litem (GAL), actually said that they were intended to suggest "state-of-the-art" care, and "do not indicate an exclusive course of treatment or serve as a standard of medical care." (R. 1982-83, 1991, 3231-33.)

In another letter dated July 9, Dr. Birkmayer said he was not convinced from the pathology reports that Parker had Ewing's, citing the lack of definitive testing, the slow

growth rate, and the location, and suggesting "more precise testing of the tissue prior to proceeding with a 45-week chemotherapy regimen." (R. 3479-80.)

Eisenman recognized that Dr. Birkmayer had "questioned the diagnosis of Ewing's sarcoma." (R. 3546-47.) However, she told Mylar that she would not allow the Jensens to use Birkmayer because he was not licensed in the United States. (R. 2455-56, 3507.) Eisenman knew that the State could not legally prohibit parents from taking their child to another country for medical treatment. (R. 1987-89.)

Eisenman also began insisting to the Jensens' counsel that only a "board-certified pediatric oncologist" was qualified to treat Parker, and therefore she would not permit the Jensens to use any physician who was not so certified. (R. 3002-05, 3008-09, 3507-08, 3029-31.) Eisenman knew that the law did not require the Jensens to use a board-certified pediatric oncologist (R. 1992, 2016). She also knew that Wagner – the doctor who had reported the Jensens in the first place – was not a board-certified pediatric oncologist. (R. 1980-81.) (Neither was the head of pediatric oncology at PCMC. (R. 2728.))

Trying to find a pediatric oncologist that DCFS would accept, Nakamura called a pediatric radiologist he knew at the Children's Hospital of Los Angeles (CHLA). The radiologist said that Ewing's in oral tissue would be highly unusual, and it would be prudent to do additional testing to confirm that it was Ewing's. (R. 2972-75, 2983-84.)

On July 10, 2003, the Jensens went back to juvenile court for a pre-trial conference. A stipulation was reached in which a Dr. Tishler at CHLA would conduct

independent testing, and then make recommendations. (R. 2911-12, 3555.)[6]

After the conference, Eisenman e-mailed Cunningham that "I view today's hearing as a pretty strong indication from the Judge that he is not going to allow us to intervene with this family." (R. 1997, 3403.) Eisenman had an emotional tie to the case, telling Nakamura that she had had a personal situation in her family and she knew that the Jensens were just in denial. (R. 2993-96.) Eisenman knew, but never disclosed to the court, that genetic testing was usually done in Ewing's cases, and that other tests were available to confirm Parker's diagnosis. She admits that "the court might have been interested in that." (R. 1011 (Ex. 2, pp. 137-138).)

The Jensens arrived at CHLA on July 21, 2003. (R. 3603-04.) Dr. Tishler had not reviewed Parker's records, and left the room during the meeting to see whether the samples had arrived yet. He said that no, he had not seen anything yet, which the Jensens assumed meant that the tissue was not there yet. (R. 2120-21, 2302, 2608-09.)

Tishler admits that he indicated at this meeting that Parker needed chemotherapy based solely on the earlier pathology reports, not on evaluations by his own institution. He said that PCMC was a good hospital and he would be inclined to defer to it, even though he had not read all the documents yet. (R. 2193, 2232, 2464-66, 3088-89, 3098-99.) The Jensens were dismayed. They understood that the July 10 stipulation required a fresh evaluation, not a deferral to PCMC. (R. 2234, 2499-2500.) Their attorney and the

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[6] Nakamura advised the court of one problem that could affect the testing: PCMC had lost Parker's tissue. (R. 3545.) The samples were missing for nearly two weeks until "eventually" they were found. (R. 1784, 1974-75, 2813, 2881-82, 3512.)

GAL had the same understanding. (R. 2885-86, 2911-12, 3015-16.)

Although Tishler said he already had a recommendation based on PCMC's reports, he said he would have molecular testing done on Parker's tissue. (R. 3088-89, 3094-95, 3113.) Eisenman, meanwhile, was moving forward with removing Parker from his parents' custody. Even before the Jensens arrived in Los Angeles, she had drafted a warrant to take custody. (R. 3412.) Defendant Wagner (who had moved to Ohio) signed a July 22, 2003, affidavit for that purpose, repeating the misrepresentations and omissions from his earlier reports to Corwin and DCFS. (R. 3156-57, 3607-09, *see* p. 12-13, *supra.*)

Because Tishler had already expressed an inclination to defer to PCMC, Daren called another doctor to whom they had been referred, Dr. Charles B. Simone. (R. 2456-57, 2502.) From Simone's website, the Jensens concluded that he had served as a medical oncologist and tumor immunologist at the National Cancer Institute, helped organize the Office of Alternative Medicine of the National Institutes of Health, and had authored several books about cancer. (R. 3339-43.)

Simone said he would accept Parker in his care. He said that chemotherapy was a possibility, but that until he performed a full examination, he could not recommend a treatment. (R. 2190-02, 2461, 2504-05, 2617.) From Lowichik's original report, Simone questioned whether Parker might have lymphoma, and recommended that the sample be sent to an expert at the National Cancer Institute. (R. 2507, 3063-64, 3612-13.)

On July 24, 2003, Tishler at CHLA sent Daren Jensen an e-mail stating, "I have asked Dr. Gonzales to perform the specific genetic testing we discussed on Tuesday. After we complete testing here we can release the tissue block to an outside consultant,

either our colleagues or an institution of your selection." (R. 3617.)

The day before a July 28, 2003, court conference, Dr. Simone told the Jensens and Nakamura that he was not willing to become involved in a court battle. (R. 2188-89, 2618-19.) Before court the next day, the Jensens gave Simone's information to Eisenman. Because Simone only ruled out acting as Parker's primary physician if he were dragged into a court battle, the Jensens hoped that Eisenman would allow him as their physician because he was an oncologist. (R. 2246.)

In the July 28 conference, Tishler was conferenced in by phone. (R. 3103-04.) He said that CHLA's testing was "being done right now," and that it would be completed after the tissue blocks came back from NCI. (R. 3558.) Tishler had not seen any pathology report from his institution, and knew that the lab was still working on the genetic studies. (R. 3104.) He stated, "We will be doing the comprehensive testing and [treatment] is to occur when we are finished." He estimated he would have the test results and be prepared to make a final recommendation in ten days. He confirmed that he would not be issuing a final recommendation until he had those test results. (R. 0515 (Ex. 33c, pp. 23-24), 3481-82, 3560-62.) Based upon the prediction that CHLA's results and recommendations would be in within ten days, the juvenile court directed that chemotherapy was to begin by August 8. *Id.*

When asked whether she could team up with Dr. Simone, defendant Albritton (Wagner's replacement in the case) stated, "My understanding of the fact is that he is not board certified in oncology, either pediatric or medical oncology." (R. 0515, Ex 33c, pp. 50-51.) At that time, Albritton knew, and did not disclose, that defendant Wagner was

not a board-certified pediatric oncologist. (R. 1488, 1512, 1980-1981, 3246, 3263-65.) Cunningham testified that, had she known that Wagner was not a board-certified pediatric oncologist, she would have brought it to the court's attention at that time. (R. 1924-25, 1931.) The court said that Simone could not be Parker's primary physician. (R. 3562.)

The juvenile court indicated that CHLA's test results would be dispositive (R. 3481-82), and set an evidentiary hearing for August 20 on DCFS's petition for custody. (R. 2896, 2986-87, 3481-83.)

Tishler never notified anyone that the CHLA testing was complete. Between July 28 and August 8, the GAL called and e-mailed Tishler directly, but Tishler did not report any test results to her. (R. 2862-63, 2883-84, 2887-88, 3101-02.) On August 4, 2003, Dr. Tishler sent Eisenman an e-mail, which did not mention any results. (R. 3101, 3616.) Daren contacted CHLA several times to ask about test results, with no success. (R. 2516, 2607-08.) The Jensens never went back because "they never got back to us and told us that they had done the test and that he had [Ewing's]." (R. 2178, 3105.)

On July 31, 2003, the National Cancer Institute doctor expert issued a report that said in part: "The site of presentation would be very unusual for PNET. Furthermore, FLI-1 protein expression is not specific as vascular tumors can also be positive. Molecular studies for the 11;22 translocation are being performed at Children's Hospital, and should be helpful in precise classification. However, the histological and immunophenotypic features are not those of lymphoma." (R. 3623.)

Because Simone as a primary care physician was no longer an option and CHLA had already indicated an inclination to defer to PCMC, the Jensens continued to look for

someone who would perform the independent evaluation they wanted. (R. 2508, 2193.) They saw a story about a boy with a blastoma whose parents wanted to go to the Burzynski Clinic in Houston. (R. 2197.) From its website, it appeared that the Clinic had been studying and treating cancer since 1977, that its staff included a physician who was board-certified in internal medicine and hematology, and that it "work[ed] with other nearby medical providers to offer complete treatment for patients." (R. 3334, 3336-37.)

Daren called the Clinic to ask if it had a board-certified pediatric oncologist, and was told yes. (R. 2204-05, 2480-81, 3129.) (Nakamura was also informed that the Clinic had a qualified physician on staff who treated cancer (R. 2981-82).) PNET was on the list of diseases that the Clinic treated (R. 3134-38). The Jensens faxed Parker's records to the Clinic (R. 2196), and an appointment was made to admit Parker for an evaluation to begin August 12. (R. 2202, 2247-2248, 2264, 2648, 2658-59.)

The Jensens believed that, if Parker was not in chemotherapy by August 8, they would be permitted to explain why at the August 20 hearing. (R. 2194-95, 2259, 2288-89, 2466-67, 2508-11, 2515, 2521-22, 2543.) The Jensens' attorney considered that a reasonable belief in light of the proceedings to date. (R. 2986-87.) The Jensens, their attorney, and the GAL all understood that, under the stipulation, the Jensens were not required to submit Parker to chemotherapy until an independent diagnosis had been rendered by CHLA based on the results of its testing (R. 2549-50, 2885-86, 2911-12, 3015-16), which had not been issued yet.

In anticipation of the upcoming tests in Houston, Parker suggested a get-together with extended family members, and a friend volunteered his cabin on the Idaho side of

Bear Lake. (R. 2268-2270, 2521, 2567.) On the morning of August 8, the Jensens left with their children and boat for the cabin, where they met other relatives. They planned to leave their other children with Barbara's parents in Idaho and leave for the Clinic in Houston on Sunday. (R. 2269-72, 2275, 2518-19, 2526, 2533, 2567.)

Although Eisenman knew that the controlling test results from CHLA were not in yet, she proceeded with her plan to transfer custody of Parker. At 1 p.m. on August 8, she called a police officer, Travis Peterson, with whom she was acquainted and told him she would need help removing a child. (R. 1943-44, 2020-21, 3641.)

Defendant Cunningham signed an affidavit that she admits presented only the State's side of the story and contained misleading information. (R. 1937, 3440-46.) For example, Cunningham admits that she knew by then that testing had not been conducted at Harvard, that Parker's CT and bone scans were normal, and that the Jensens were not pursuing IPT, all of which was contrary to statements in her affidavit. She never spoke with a pathologist, as her affidavit claimed. She said the Jensens had consulted "a man" in Vienna, rather than naming Birkmayer or identifying him as a doctor. (R. 1935-40.) She claimed that Tishler had said "Parker should commence chemotherapy," when she knew he had actually said that he would not be making final treatment recommendations until all of the testing was in, including genetic testing. *See* p. 22, *supra*.)[7]

Eisenman and Cunningham took an order and warrant down to court, where an off-

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[7] Cunningham submitted another affidavit on August 18 to continue the custody warrant that repeated these misrepresentations. (R. 3440-46.)

the-record hearing occurred in chambers. (R. 2861, 3481-83.) The Jensens' attorney, Nakamura, was contacted by telephone, and told the court about the Jensens' arrangements with the Burzynski Clinic. (R. 2011, 2024.)

Cunningham paged defendant Albritton, who represented that Burzynski was "NOT a board certified oncologist-hematologist and that his clinic is well known for providing extremely controversial therapy." (R. 1943, 2024-25) (emphasis in original).) Albritton did not disclose that another doctor at the clinic was board-certified. She also represented that the Clinic was only conducting clinical trials of nonapproved FDA treatments of cancer not involving chemotherapy (R. 2012, 2863-64, 3032-34), which was untrue. The Clinic offered chemotherapy, and FDA trials were only one of its departments. (R. 3121-22, 3125, 3132-34.)

No one informed the court that the CHLA test results were not in yet. (R. 2863.) The judge signed Eisenman's order and warrant transferring custody of Parker to the State. (R. 2013, 2027, 3485-86.) Cunningham then went to the Jensens' house to execute the warrant. A neighbor said she thought they had gone water skiing, as they had taken their boat with them, and a note appeared to have had been left by another neighbor. It was evident that the Jensens "had been gone all day." (R. 2866-68, 3642.)

At about 6 p.m., Daren was informed by Nakamura that a "pickup order" had been issued, and that Parker was to be placed in DCFS custody to start chemotherapy. (R. 2273, 2529.) After consulting with an attorney in Idaho, the Jensens concluded that the best action would be to get the evaluation and then bring Parker back for the August 20 evidentiary hearing. Otherwise, the State would take him and begin chemotherapy, and

they would never get the second opinion they wanted. (R. 2278-79, 2532, 2535-39.)

The next day, Cunningham went back to the Jensens' home to execute the warrant, recording in her activity log that it was apparent that the Jensens had not returned home. (R. 3720.) Eisenman faxed a letter to the Burzynski Clinic prohibiting it from seeing Parker, and requesting that she be contacted immediately if the Jensens came there. (R. 2014-15, 2891-92, 3732.) On August 13, she made another report to Officer Peterson, who opened up a new case file. (R. 3658-61) She also arranged for a meeting with the Salt Lake County District Attorney's office. (R. 0515 (Ex. 33d, p. 12), 1946, 2904-05.)

Later that day, an unscheduled conference call took place with the juvenile court in which the August 20 evidentiary hearing was changed to a status/review hearing. (R. 0515 (Ex. 33d, pp. 12, 14).) During that call, Eisenman misrepresented that the Jensens "have not responded to phone calls left on their cell phone or home phone" (R. 0515 (Ex. 33d, p. 3)), when no such messages had been left. (R. 2545-47.)

Eisenman subsequently realized that no order had ever been entered on the July 28 hearing. (R. 2026.) (The minutes of the hearing had not been filed until August 11 (R. 3735-36).) Someone arranged for an order to be signed on August 15, 2003. (R. 3702-04.) That same day, the meeting Eisenman had arranged was held with Deputy D.A. Angela Micklos. (R. 2919, 3744.) Based upon a (mis)representation by Eisenman that the Jensens had fled the state after the August 8 order transferring custody was issued,

Micklos elevated the charges to felony child kidnapping. (R 2928-29.)[8] Warrants on the felony charges were activated nationwide, and extradition was initiated. (R. 2917-18, 2923-25, 3683, 3764-73, 3777, 3781.)

Eisenman knew that the Jensens had not fled the state after issuance of the custody order. Among other things, she had Cunningham's logs (R. 1961), which said the Jensens had not been home all day when Cunningham arrived with the warrant. It also seems inherently improbable that two people fleeing the state would haul their boat with them and their other children, who could have remained at home with Barbara's brother.

While still in Idaho, Barbara Jensen let Parker drive her Suburban down her parents' driveway to get the mail. He had an accident, and neighbors called the police. (R. 2280-83.) Daren Jensen was arrested on the child kidnapping warrant, and spent four days in jail until his father-in-law was able to post $5,000 bail. (R. 2569.)

Barbara left for Houston with Parker, another son, and her mother. (R. 2318, 2320.) Upon arrival, however, she received a message from the Clinic: Based upon Eisenman's letter, don't come here. (R. 2206-07.) Barbara and Parker could not return home; news reports flashed their photographs repeatedly and said they were the subject of a manhunt. (R. 2323-24.)

The August 20, 2003, review hearing proceeded without the Jensens. At the

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[8] Eisenman does not admit making the statement, but the only persons at the meeting with knowledge of the Jensens were Eisenman, Cunningham, and the GAL, and it was not the latter two. (R. 1946-48, 2905-08.) Around this same time, an assistant A.G. made the same statement to Attorney General Mark Shurtleff; Eisenman was the only AAG on the case, and she met with Shurtleff at about that time. (R. 2039, 3042-43, 3053-55.)

hearing, Eisenman made several factual misrepresentations, including:

- "to this date I have never received anything from Dr. Birkmayer other than a letter," when she had received three letters, and had told the Jensens they could not use Birkmayer;

- "From Dr. Simone I have never received anything other than a letter," failing to disclose her knowledge of a telephone call on July 30 from Simone to PCMC in which Simone stated a belief that he could convince the Jensens to have appropriate treatment for Parker. (R. 3620);

- "From the L.A. Children's Hospital I have received nothing except for the telephone information that I solicited from Dr. Tishler," failing to disclose the August 4 e-mail she had received from Tishler;

- "I'm going to state for the record that I did contact the Birkmayer Clinic to ask them what kind of treatment they had for Parker. Mr. Mylar sent me a letter asking me not to contact them further and I never heard a response." (R. 0515 (Ex. 33E, p. 22).) That was untrue. Mylar responded to all requests for information from Eisenman. (R. 3508.)

The court scheduled an evidentiary hearing for October 8-10, 2003. (R. 3569-70.)

On August 22, 2003, defendant Cunningham issued a finding that the medical neglect allegations against the Jensens were substantiated. (R. 1949-50, 3344-45.) At that time, her records reflected total activity on the case of 3 hours and 46 minutes, of which one hour consisted of a meeting between Parker and *the GAL* (not Cunningham). (R. 1919, 1921.) Cunningham later went back and padded her logs with nine more hours, including non-existent activities (*e.g.*, recording time for a hearing that she did not attend). (R. 1915-1920, 1945.)

In September 2003, Eisenman left for a new job. (R. 2028-29.) At that time, she made a number of factual misrepresentations and omissions to her supervisor, including:

- Failing to disclose that DCFS/Cunningham had not investigated the reporting doctor's allegations, which he would have recognized as

improper.

- Failing to disclose that the Jensens had asked for genetic testing and been refused.

- Misrepresenting that the Jensens had fled the state after the warrants were issued.

- Misrepresenting that the Jensens had chosen not to use Dr. Birkmayer.
- Misrepresenting that the Jensens had declined a second opinion from Harvard because their insurance would not pay for it.

(R. 3038-39, 3042-43, 3045-49, 3053-55.)

At the request of the Utah governor's office, DCFS director Richard Anderson flew to Idaho and met with Daren Jensen. (R. 1570-71, 2579-80, 3813-14.) Anderson told the Jensens that he would be running the case from then on. (R. 2583-84.)

Anderson relied in part on a factual timeline provided by Eisenman (R. 1551, 1972-73, 3813-14), which contained numerous misrepresentations and omissions. For example, Eisenman omitted the key fact that the Jensens were questioning the diagnosis, and instead represented that the Jensens were simply rejecting chemotherapy as a treatment. Eisenman's timeline also:

- Falsely indicated that the Jensens were pursuing IPT as of July 10, when she had been informed by the Jensens' attorney a week earlier that the Jensens were not committed to IPT. (R. 3509, 3515-16.)

- Misrepresented that a second opinion was not obtained from Harvard because the Jensens "declined to pay the consultation fee." (R. 2370-71, 2639.)

- Misrepresented that the LDS Hospital doctor had performed "a PET scan and other tests," when he had performed no tests at all (R. 3076), and that Eisenman had no records of this consultation, when the Jensens' attorney had given her a copy of a letter from him. (R. 3509.)

- Misrepresented that Wagner did not contact DCFS until after the June 9

meeting, when DCFS's own records showed contact on June 2.

- Misrepresented that the Jensens had canceled the Friday meeting, when it was Wagner who canceled.

- Misrepresented that PCMC oncologists did not know that a second excision was going to be performed on Parker's tissue, when Wagner was informed of it ahead of time, and the procedure itself was cleared with Dr. Muntz at PCMC.

- Misrepresented that the Jensens voluntarily chose not to use Dr. Birkmayer, when she had told them they could not use Birkmayer.

- Omitted the key fact that the Jensens were not required to begin treatment until CHLA completed genetic testing, the results of which had not been received by August 8 (which Eisenman knew, having received the most recent communication from Tishler on August 4, which did not mention any results);

- Implied that it was the police, rather than she, who contacted the District Attorney's office to pursue criminal charges.

At the meeting in Idaho, Anderson was impressed by the extent of the Jensens' research. (R. 1568, 1572, 1616, 3813-14.) He told Daren, "I understand you're a great parent. I can see that, but we can't let you go. We can't have it over. It's gone too far." He later reiterated to Barbara and Daren that he could tell they weren't neglectful parents, but that things had gone too far and he couldn't let them go. (R. 2293, 2581-82, 2585.)

Anderson concluded that the events to date were consistent with DCFS policy, because Cunningham had been told that Parker could die in "five days" if chemotherapy did not begin, which triggered "emergency" procedures. (R. 1552-53, 1596, 1610-1611, 1681-82.) But for that representation, Anderson says, the Jensens would have received a "thorough pre-removal investigation," including a meeting with the caseworker to discuss concerns and options. (R. 1556-58, 1614-15, 1671.)

However, there is evidence that DCFS's custom and/or policy was not to

investigate medical neglect reports made by a PCMC doctor. (R. 1676-77.) Thus, for example, DCFS usually obtained second opinions from PCMC on reports from outside doctors, but the reverse was not true. (R. 2031-33, 2831-32, 2836; *see also* p. 12-13, *supra*.) Furthermore, even under DCFS's emergency provisions, Cunningham was still required to, and did not, "meet with the parents, attempt to negotiate voluntary compliance with medical treatment pending or in lieu of court involvement, and assess and document the parents' reasons for refusal to treat." (R. 3431.)

Defendant Anderson had the authority to (and eventually did) authorize the dismissal of DCFS's medical neglect allegations against the Jensens. (R. 1564, 3018-19.) However, he was unwilling to do so even if a licensed physician assumed care of Parker, because it was his position that, if there were conflicting opinions between a parent's physician and a physician upon whom DCFS was relying, the parents could not make the choice; instead, DCFS would require them to go to court and have the court decide "the more credible or the best treatment that is going to happen from the recommendation of the State or the parents." (R. 1565-67, 1678.) Anderson also refused to authorize a dismissal unless Parker was treated by a board-certified pediatric oncologist. Although he says his hands were tied by prior court orders, he admits that he had the authority to eliminate that requirement, and eventually did. (R. 1577-78.)

At the August 29, 2003, meeting, Anderson "agreed . . . to go back and get the warrants lifted." (R. 1575, 1594.) Barbara and Parker were then able to rejoin their family in Idaho. Immediately after a September 3 hearing, however, new warrants were issued. (Docket in Criminal Case, 09-03-03 entry.)

By this time, the Jensens were struggling financially. Daren had lost his job after the neglect proceedings began, and his health insurance had lapsed. (R. 2587.) Anderson initially said that the State would pay for additional testing, but only if the Jensens agreed to place Parker in foster care. (R. 2587-88.)

To meet Anderson's requirement of a board-certified pediatric oncologist, the Jensens agreed to have a Boise physician, Dr. Johnston, perform an independent evaluation, including new testing. (R. 0515 (Ex. 33h, p. 9).) Anderson understood that, under this September 5, 2003, stipulation, Johnston was not to make recommendations until the testing was completed. (R. 1586-87.) Contrary to the stipulation, however, Johnston informed Anderson that he had told the Jensens at their first meeting that he had a "strong inclination" and there was "every indication" that he was going to recommend chemotherapy. (R. 1588, 1598-99, 2473-74, 2669.)

At that first meeting, Dr. Johnston informed the Jensens that he had learned from CHLA that its genetic testing had been unable to document an 11;22 translocation. (R. 2474-75, 3090, 3303.) (This was the first time anyone heard any results from CHLA. (R. 2473.)) Speculating that CHLA's negative result resulted from degradation of the sample's RNA, Johnston had the sample sent to Sacred Heart Medical Center in Spokane for molecular testing using DNA. (R. 3303.) Johnston then called Anderson and said that he was going to call the Jensens in two days and recommend chemotherapy, even though the genetic testing was not back yet. (R. 1601, 1604-06.) Anderson did not disclose that communication to the Jensens or the juvenile court.

On September 26, 2003, Dr. Johnston announced, "I learned yesterday that the

cytogenetics lab at Sacred Heart Medical Center in Spokane has confirmed a t(11;22) translocation in Parker's tumor cells, confirming the diagnosis of Ewing's sarcoma." (R. 3807.) Johnston admits that this statement was not true. Sacred Heart reported "a" rearrangement involving the 22 chromosome, but could not confirm an 11;22 translocation. (R.2060, 2676-78, 2701-03, 3817-22.) Rearrangements of the 22 chromosome are not specific to Ewing's. (R. 2057-58, 2098-99, 3165-66, 3204-05.)[9]

It was evident to Dr. Johnston that all of the pathologists prior to his involvement had been reluctant to call Parker's condition Ewing's. (R. 1791-92, 2699; *also* 2696-2701 ("suggestion" and "consistent with" indicate uncertainty). Johnston's pathologist was also hesitant because the immunohistochemical testing was equivocal. Therefore, he and Johnston decided to defer to the original PCMC pathologist and call it Ewing's. (R. 1600, 2214-15, 2235-37, 2476, 2560-61, 2719-21, 3303, 3572-73, 3576-77.)

The Jensens balked at Johnston's actions. Shortly afterward, defendant Anderson agreed to stop insisting on a board-certified pediatric oncologist, and allowed Parker to be treated by any licensed physician. He approved a motion to voluntarily dismiss the DCFS petition. (R. 1587-91.)

Criminal charges in Utah were still pending, on which the Jensens had been booked and released in September. (R. 3760, 3784.) The child kidnapping charges carried a mandatory minimum sentence higher than that for first-degree murder, and

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[9] Johnston says he does not know why he "misspoke," but admits that he became "wrapped up in this whole situation to the point that it became a bit of an obsession." (R. 2692.)

going to trial would have cost the Jensens thousands of dollars. (R. 3022-23, 3025.) In exchange for a dismissal of the first-degree felony charges, the Jensens were required to enter into a plea in abeyance on the misdemeanor custodial interference charges. (R. 3778-79, 3823-24.) The Jensens had to admit to factual elements necessary to support the prima facie elements of the misdemeanor offense, but were not required to disclaim the existence of defenses that could have been asserted at trial. (R. 2926-27.) The Jensens' pleas were not to be entered as a conviction. They would be held for 12 months, at the end of which they would be withdrawn, replaced with not-guilty pleas, and the case would be dismissed. (R. 2926-27, 3021-22.)

On October 31, 2003, the GAL forwarded an e-mail to Eisenman from Dr. Johnston in which Johnston said that he "spoke to Dr. Moore, who is taking care of Parker now. She actually sounds pretty reasonable." (R. 3413.) In November 2003, the Jensens had a margin performed on Parker. (R. 2114-15, 2216.) A Stanford University pathologist examined the tissue removed and reported no sign of cancer. (R. 2942-43.)

The Jensens took Parker to see Dr. Moore regularly, but eventually stopped because Moore said there was nothing to treat. (R. 2252, 2941-43.) Cunningham's neglect finding was changed from supported to unsupported, but the Jensens are still in the DCFS system. (R. 1679-80, 1916-17.) Six years later, Parker is alive and well.

SUMMARY OF ARGUMENT

The trial court's ruling that res judicata bars the Jensens' state law claims is erroneous for several reasons. The court first erred in deferring to the federal court's interpretation of the federal constitution without undertaking any independent assessment

of the Jensens' state law claims or the record. It is contrary to principles of state constitutional analysis to accept an interpretation of the federal constitution as the presumptive scope of state constitutional rights.

The court further erred in ruling that the Utah Constitution did not afford the Jensens any protections against the type of conduct reflected in the record. The inalienable rights recognized and guaranteed by Article I, § 1, include the fundamental right to make decisions regarding one's family, including health matters. Interference with those rights is presumptively unconstitutional, unless a defendant can prove that his actions were narrowly tailored to achieve a compelling state interest. None of the types of alleged misconduct here (misrepresentation and omissions, forcing the Jensens to follow the recommendations of a state-preferred physician rather than the physician of their choice, reporting the Jensens to DCFS because they refused to start chemotherapy without reasonably requested diagnostic testing, and failing to investigate medical neglect allegations before making them) satisfies either criterion.

Similarly, precedent form this Court and sister courts, clear and longstanding statutory prohibitions, and the background and intent of the Framers contradict the trial court's (implicit) ruling that the defendants' actions were not violative of the substantive *and procedural due process rights guaranteed in Article I, § 7.*

With respect to Article I, § 14 (search and seizure), a state actor's making of material misrepresentations and omissions to a court and others to is inherently unreasonable. The Framers of the Utah Constitution had endured harsh consequences from the use of falsehoods by government actors, lending even greater force to the protections afforded by

this section. In light of those same experiences, the Framers also would have intended the protections of Section 14 to extend to both custodial and non-custodial seizures.

Although its incorrect interpretation of the state constitution requires reversal in itself, the trial court's ruling is also erroneous because the defendants did not establish as a matter of law all of the elements of res judicata. There was no "earlier proceeding," the Jensens' state claims and issues were not finally adjudicated on the merits, and the state claims and issues are distinct from those decided by the federal court. Additionally, the policy considerations underlying res judicata are not present, reaffirmed by the federal court's declination to rule on state claims because of the "important" issues raised.

ARGUMENT

I. THE UTAH CONSTITUTION CONFERS BROADER PROTECTION THAN THE FEDERAL CONSTITUTION.

As noted above, the trial court's application of res judicata was based upon its conclusion that the Utah Constitution did not afford the Jensens any broader protections than the United States Constitution (as interpreted by Judge Stewart). Because Judge Stewart ruled that the federal constitution did not protect the Jensens at all from the defendants' actions, if this Court concludes that the Utah Constitution does afford such protections, by necessity its protections are broader than those of its federal counterpart.

A. State constitutional analysis in general.

In earlier days, disposition of state constitutional claims typically began with an analysis of federal law, followed by an assessment of whether any reason existed to stray from whatever federal courts had opined at the time. This variation on the "lockstep"

theory (in which state constitutions are presumed to have the same scope as their federal counterpart) was initially endorsed by this Court. *See, e.g., State v. Earl*, 716 P.2d 803, 805-06 (Utah 1986) (recommending analytical process from *State v. Jewett*, 500 A.2d 233, 236-38 (Vt. 1985)); *see also State v. Gunwall*, 720 P.3d 808, 811-13 (Wash. 1986).

Over time, state courts began to recognize the inappropriateness of deferring the construction of their own state's constitution to a court charged with construing a national constitution. *See, e.g., Davenport v. Garcia*, 834 S.W.2d 4, 16 (Tex. 1992) ("Our Texas Forbears surely never contemplated that the fundamental state charter, crafted after years of rugged experience on the frontier and molded after reflection on the constitutions of other states, would itself veer in meaning each time the United States Supreme Court issued a new decision"); *State v. Watts*, 750 P.2d 1219, 1221 n.8 (Utah 1988) ("choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts").

A state court construing its own constitution "do[es] not share the strong limitations perceived by [the U. S. Supreme Court] in its ability to enforce constitutional protections aggressively. Those limitations arise from the structure of our federal system, the Court's role as final arbiter of at least the minimum scope of constitutional rights for a vastly diverse nation, and the Court's lack of familiarity with local conditions." *State v. Hunt*, 450 A.2d 952, 91 N.J. 338 (1982); *see also* John W. Shaw, "Principled Interpretations of State Constitutional Law–Why Don't the Primacy States Practice What They Preach," 54 U. PITT. L. REV. 1019, 1028 (1993) (primacy allows tailoring of state

constitutional protections to the values of state residents, "rather than enforcing the lowest common denominator of broadly shared national values").

Factors in state constitutional analysis include: "legislative" history, structural and textual differences between the state and federal constitutions; whether the subject matter is of local interest; state history, traditions, and public attitudes; sister state law; and "the common law, our state's particular . . . traditions, and the intent of our constitution's drafters." *West v. Thomson Newspapers*, 872 P.2d 999, 1013 (Utah 1994); *Society of Separationists, Inc. v. Whitehead,* 870 P.2d 916, 921 n. 6 (Utah 1993); *Hunt, supra.*

B. "Legislative" history and intent of the Framers generally.

Relatively little history is available regarding the Declaration of Rights in the 1895 Utah Constitution. *Society of Separationists*, 870 P.2d at 929 ("There was little discussion or controversy regarding any of the provisions of the Declaration of Rights"). Those rights were so fundamental, so uncontroversial, that there was nothing to debate.

Convention delegates knew that noncompliance with Congress's expectations would put a 40-year quest for statehood at risk. "It is natural, under such circumstances, for men to proceed with caution." *State v. Norman*, 16 Utah 457, 52 P. 986, 990 (1898). Accordingly, the Framers borrowed heavily from the constitutions of other states that had been approved by Congress. *Society of Separationists*, 870 P.2d at 928 (particularly Nevada, Washington, Illinois, and New York).[10]

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[10] *See also* John J. Flynn, "Federalism and Viable State Government–The History of Utah's Constitution," 1966 UTAH L. REV. 311 (Illinois, New York, Nevada, Washington, and Iowa); Paul Wake, Comment, "Fundamental Principles, Individual Rights, and Free

From that fact, the suggestion has been made that it is difficult to say that the 1895 Constitution was written by Utahns for Utah. *See* C. Albert Bowers, "Divining the Framers' Intentions: The Immunity Standard for Criminal Proceedings under the State Constitution," 2000 UTAH L. REV. 135, 148 (summarizing contention). That does an injustice to the Framers. Rather than simply copying verbatim from a single constitution, delegates carefully selected and rejected portions of various documents as suited their intent. *See, e.g.*, 1 *Official Report of the Proceedings and Debates of the Convention ("Proceedings")* at 423 (1898) (B. H. Roberts, questioning adoption of Wyoming's provision on female suffrage rather than that of Virginia, New York, Ohio, or Indiana); 483 (John Murdock: "I don't wish to refer to what older states have done; they have done as they pleased, and I hope the people of Utah will do as their best judgment will dictate to them, and I am not afraid of innovation"); 776 (David Evans: mentioning constitutions of Kentucky, North Dakota, Maine, Colorado, and California).

Utah's Declaration of Rights is not identical to that in any of the other 44 state constitutions, copies of which had been provided to delegates. Choosing from among different options reflects intent, just as a court's choice of quotations from other cases is no less a statement of its own intent. Moreover, some Framers expressed a view that Utah was unlike any other state, and that their goal was to be more progressive than other states. *See, e.g., id.* at 433-34 (Andrew S. Anderson: urging delegates to "show to the

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Government: Do Utahns Remember How to Be Free?" 1996 UTAH L. REV. 661 (Washington); Wallentine, *supra* (Nevada, Iowa, Illinois, New York and Washington).

world that Utah is in the advance march of progress and civilization, and in those life-endearing principles of liberty and justice"); 545 (Andrew Kimball: "the people of Utah through their circumstances are different to any other people in the United States").

At the time of the 1895 Convention, nearly 90 percent of Utah's population, and three-quarters of Convention delegates, were members of the LDS Church. Richard D. Poll, ed., UTAH'S HISTORY (Brigham Young University Press, 1978), p. 393; *Society of Separationists*, 870 P.2d at 928. It is thus appropriate to discuss the background and views of church members at the time of the convention. *See id.* at 929 n. 31; P. Bobbit, CONSTITUTIONAL FATE THEORY OF THE CONSTITUTION (1984) at 9-11 (relevant history includes prevailing sentiment at time of adoption).

LDS Church founder Joseph Smith had expressed concern about weak federal constitutional protections:

> The only fault I find with the Constitution is, it is not broad enough to cover the whole ground. . . . Its sentiments are good, but it provides no means of enforcing them. It has but this one fault. Under its provision, a man or a people who are able to protect themselves can get along well enough; but those who have the misfortune to be weak or unpopular are left to the merciless rage of popular fury.

Larry E. Dahl and Donald Q. Cannon, ed., ENCYCLOPEDIA OF JOSEPH SMITH'S TEACHINGS, p. 144 (quoting Sabbath address, Nauvoo, 15 October 1843).

When it came to basic human liberty, the Framers were unwilling to sacrifice their principles even at the cost of the great prize. Including women's suffrage in the state constitution would "dig a grave for statehood," Representative B. H. Roberts warned. 1 Proceedings at 425-28. Such concerns could "go to the dogs," delegates declared. "[I]f Utah is to be immolated for standing by her principles, for enlarging the borders of

liberty, let the sacrifice be made, let her be bound upon the altar, let the high priest of tyranny come forth and plunge the knife into her breast. She cannot perish in a nobler cause than that of freedom and equal rights." *Id.* at 738 (Orson F. Whitney); *id.* at 499 (Alma Eldredge) ("[D]o I want statehood at the sacrifice of honor?").

The Framers of the state constitution did not see their months-long labor as makework, as it would be if construction of the federal Constitution were dispositive. They viewed and intended the state constitution to be the supreme, fundamental law of this state. *See id.* at 434 (Samuel Thurman); 479-80 (Charles Varian); 502 (Eldredge); 561 (Karl G. Maeser); 572 (Charles Crane); 737 (Whitney); *State v. Norman,* 16 Utah 457, 52 P. 986, 987 (1898); *State v. Eldredge*, 27 Utah 477, 76 P. 337, 339 (1904).[11]

Consistent with that intent, this Court has repeatedly stated that the federal constitution sets the floor, but not the ceiling, of constitutional protections for Utahns. *Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 17, 108 P.3d 701; *Society of Separationists,* 870 P.2d at 940; *West*, 872 P.2d at 1007 ("Above this floor, states may balance the need to redress injuries to reputation with guarantees of free expression in a distinct way, thereby accounting for the unique history, needs, and experiences of their residents").

For these reasons, the lower court should have reviewed the Jensens' state

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[11] The assumption that the state constitution would provide the primary basis of protection for Utah residents is reinforced by the fact that, at the time of the Convention, none of the protections of the Bill of Rights had been applied to the states through the Fourteenth Amendment. The first to be applied (takings) was in 1897. *Chicago B. & O.R.R. v. Chicago,* 166 U.S. 226 (1897). First Amendment protections, for example, were not held applicable to the states until 1925, *Gitlow v. New York,* 268 U. S. 652 (1925); the Fourth Amendment not until 1949. *Wolf v. Colorado,* 338 U.S. 25 (1949).

constitutional claims independently of their federal claims. *See West*, 872 P.2d at 1007 (adopting "primacy" approach in free speech claim under state constitution). That is particularly true where the family and a state's judicial process are matters of local interest. *In re Burrus*, 136 U.S. 586, 10 S.Ct. 850 (1890); *Hunt*, 450 A.2d at 366. In any event, however, the trial court erred when it ruled that the Utah Constitution did not afford broader rights to the Jensens than the federal constitution.

There is evidence in the record from which a jury could find that the defendants (1) made material misrepresentations and omissions in order to remove Parker from his parents' custody and force chemotherapy upon him; (2) refused to let the Jensens choose between conflicting recommendations of two licensed physicians (*i.e.*, imposed a "comparative unfitness" standard) and reported the Jensens when they continued to request diagnostic testing that all witnesses concede was reasonable; (3) failed to investigate, by choice, custom, and/or policy, the medical neglect allegations, including corresponding failures to train and supervise. *See* Statement of Facts, *supra*.[12]

From the time of its ratification, this Court has held that the Utah Constitution "is not to be interpreted on narrow or technical principles, but liberally, and on broad, general lines, in order that it may accomplish the object of its establishment, and carry out the great principles of the government." *North Point Consolidated Irrigation Co. v. Utah &*

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[12] *See, e.g.,* pp. 5, 6, 7, 8, 10, 11, 12, 13, 15 (Wagner misrepresentations / omissions), 14, 15, 25 (Cunningham), 18, 19, 20, 25, 26, 27, 28, 29, 30, 31 (Eisenman), 22, 26 (Albritton), 32-33 (imposition of comparative fitness standard by Anderson) 14 (same by Cunningham), 13, 14, 29, 31, 32 (Cunningham/Anderson's failure and/or policy not to investigate).

Salt Lake Canal Co., 14 Utah 155, 46 P. 824 (1896); *Shields v. Toronto,* 16 Utah 2d 61, 395 P.2d 829, 830 (1964) (court must "give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions"). In this case, the nature of the misconduct, the state's common law and legal precedent, the intent of the Framers, and the history and attitudes of the state, all compel a finding that these actions (if found by the jury) violated Article I, Sections 1, 7, and 14 of the Utah Constitution.

1. Article I, § 1 (right to enjoy and defend lives and liberty).

Article I, § 1 of the Utah Constitution provides: "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right."

This "inalienable rights" provision has appeared in each version of the state constitution, beginning with the 1849 Constitution of the State of Deseret ("In Republican Governments, all men should be born equally free and independent, and possess certain natural, essential, and inalienable rights; among which, are those of enjoying and defending their Life and Liberty; acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.").

There is no comparable provision in the U. S. Constitution. *See* 1 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 319, 762-65, 840; Bruce Kempkes, "The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight," 42 DRAKE L. REV. 593, 605.) The closest language is in the Fifth Amendment,

which states, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ," but does not mention "inherent and inalienable" rights, or the right to "defend . . . lives and liberties" recognized in Article I, § 1.

The right to enjoy and defend lives and liberties as guaranteed by a state constitution "includes the right of privacy, the right to marital privacy and choice . . . [and] the right to protect one's health." 16A C.J.S. CONSTITUTIONAL LAW § 737 (citations omitted); *see also Jarvis v. Levine*, 418 N.W.2d 139, 148-149 (Minn. 1988) (right to make decisions regarding one's health recognized in state constitution has been rooted in the law "for centuries"); *Sojourner v. New Jersey Dept. of Human Services*, 177 N.J. 318, 828 A.2d 306, 330 (2003). As articulated by this Court, Article I, § 1

> forbids the abridgment by the state of the privileges and immunities of all citizens. Under its mandate no person can be deprived of life, liberty, or property without due process of law, and every person is entitled to the equal protection of the laws, and may acquire property, possess and protect it, as well as defend his life and liberty. These are inherent and inalienable rights of citizens, and are constitutional guaranties.

Block v. Schwartz, 27 Utah 387, 76 P. 22, 24 (1904); *see also Golding v. Schubach Optical Co.*, 93 Utah 32, 70 P.2d 871, 875 (1937) ("The Constitution declares in Article I, § 1, men are by nature free and independent, and have certain inalienable rights among which are the pursuing and obtaining of happiness, and safety, and property.").

"Liberty," as encompassed within Section 1, is "a term of comprehensive scope. It embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights[.]" *Block*, *supra*, at 24-25. The right to "life, liberty and the pursuit of happiness, and as a corresponding

and accompanying right, the right to privacy in his own home," is a "just claim, God given, or innate as a human." *State v. Kent*, 20 Utah 2d 1, 432 P.2d 64, 69 (1964). In this case, each type of alleged misconduct (misrepresentations and omissions, imposition of a comparative fitness standard / refusal to permit reasonably requested testing, and failure to investigate medical neglect allegations) are protected by Section 1.

a. Misrepresentations and omissions

It has long been recognized that interference with fundamental rights by a state actor employing material misrepresentations or omissions is wrongful. *See, e.g., Meyer v. Board of County Commissioners of Harper County*, 482 F.3d 1232, 1243 (10th Cir. 2007); *Snell v. Tunnell*, 920 F.2d 673, 691-692 (10th Cir. 1990); *Malik v. Arapahoe County Dep't. of Social Services*, 191 F.3d 1306 (10th Cir. 1999); *Pierce v. Gilchrist*, 359 F.3d 1279, 1292 (10th Cir. 2004), and cases cited; *see also Merchants' Nat. Bank of Kansas City v. Robison*, 8 Utah 256, 30 P. 985 (1892) (person who signs a certificate of stock containing false information is liable; "[t]hese views are so fundamental, and so consonant with honesty and fair dealing, that they need no authority in their support").

This proposition is self-evident, because interference with fundamental rights can be justified only if a state actor proves that his actions were narrowly tailored to achieve a compelling state interest. *See, e.g., Thurnwald v. A.E.*, 2007 UT 38, ¶¶ 28, 35, 163 P.3d 623. There can never be a compelling need to intentionally or recklessly fabricate, omit, or distort evidence in order to take someone's child and force potentially unneeded medical treatment on him, or to obtain warrants or other judicial orders, nor can such conduct be "narrowly tailored." *See, e.g., P.J. ex rel Jensen v. State of Utah, et al.*, 2006

WL 1702585 **10, 16, 19 (J. Cassell, 2006) (state actor may not "threaten the Jensens, refuse to perform confirmatory tests, or make false, incomplete, or misleading statements to Utah courts[.]").

b. Refusal to allow parents to choose between licensed physicians or to seek reasonably requested testing.

Section 1 is implicated when a subject is prevented from exercising the rights guaranteed by it. *See, e.g., Golding*, 70 P.2d at 875 (Section 1 rights "are invaded when one is not at liberty to contract with others respecting the use to which he may subject his property (or use or employ his time or talents), or the manner in which he may enjoy it").

As noted above, the rights guaranteed by Section 1 include the right to make decisions regarding personal health or, in this case, to make decisions for one's child. Defendants Anderson and Cunningham interfered with these rights by requiring the Jensens to follow the recommendations of the reporting doctor, rather than a licensed physician of their own choice (who, incidentally, turned out to be right). Not only is there no compelling state interest in forcing a parent to use a particular doctor, but the unconstitutionality of such interference is widely recognized. (To avoid duplication, the discussion of comparative fitness at pp. 50-56, *infra*, is incorporated herein.) Similarly, Wagner, interfered with the Jensens' rights by refusing to perform reasonably requested diagnostic testing, and reporting the Jensens for medical neglect when they continued to insist on such testing before starting chemotherapy.[13]

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[13] Whether Wagner felt that such testing was *necessary* is immaterial, as all witnesses in the case agree that it was a *reasonable* request by the parents. The federal court (J.

c. Failure / refusal to investigate

Finally, Cunningham's (and Anderson's) failure to investigate medical neglect allegations also violates Section 1. With apologies for the double negative, there is no compelling state interest in not investigating allegations of parental neglect before curtailing a parent's liberty by making such allegations. Indeed, state statutes expressly required Cunningham to investigate – to at least *ask* the parents – even in a so-called emergency. Choosing not to do so violated Section 1 on its face.

2. Article I, § 7 (due process)

Article I, § 7 provides: "No person shall be deprived of life, liberty or property, without due process of law." This due process clause, the wording of which is similar to that in the federal constitution, affords two types of constitutional protections. First, it guarantees substantive due process rights, *Wells v. Children's Aid Soc. of Utah*, 681 P.2d 199, 204 (Utah 1984), including "the inherent and retained right of a parent to maintain parental ties to his or her child[.]" *In re J.P.*, 648 P.2d 1364 (Utah 1982); *see also In the Matter of the Adoption of B.B.D.*, 1999 UT 70, ¶ 10, 984 P.2d 967.

Interference with these rights is subject to strict scrutiny: a governmental actor must establish the means utilized are "narrowly tailored" to achieve "a compelling state interest." *Wells*, 681 P.2d at 206-07; *Thurnwald*, 2007 UT 38, ¶¶ 28, 35. *See also Jones*

Cassell) held that a refusal by a state actor to perform confirmatory tests reasonably requested by a parent states a claim for violation of the right to familial association and procedural and substantive due process. *P.J. ex rel Jensen v. State of Utah, et al.*, 2006 WL 1702585 **10, 16, 18-19, which would be particularly true if a jury found that Wagner did so in order to meet a timetable for a clinical trial.

v. Moore, 61 Utah 383, 213 P. 191 (1923) (recognizing similar right of children in familial association).

Section 7 also affords procedural rights, "notably, notice and opportunity to be heard, which must be observed in order to have a valid proceeding affecting life, liberty, or property." *Wells*, 681 P.2d at 204 (citations omitted). "The general test for the validity of such rules, the test of procedural due process, is fairness." *Id.*

Although this Court has construed the state and federal due process clauses as substantially the same in some contexts, *see, e.g., Bailey v. Bayles*, 2002 UT 58, ¶ 11, 52 P.3d 1158, that "does not indicate that this court moves in 'lockstep with the United States Supreme Court's due process analysis or foreclose our ability to decide in the future that our state constitutional provisions afford more rights than the federal Constitution." *Id.* Indeed, at the time of the Constitution's adoption, the Court observed that the two due process clauses are not co-extensive:

> The constitution of the United States cannot, as to the states, be held to be the sole unbending rule as to the method of procedure, when dealing with the life, liberty, and property of individuals in the several states. Such a rule would deprive the states of their right to regulate its procedure, laws, and rules of practice in their own courts, so as to protect life, liberty, and property by such due process of law as should be enacted with reference to the constitution of the United States which was framed for an undefined and expanding future, and for people gathered, and to be gathered, from many nations and many tongues.

In re McKee, 19 Utah 231, 57 P. 23, 26-27 (1899); *State v. Briggs,* 199 P.3d 935, 2008 UT 83, ¶ 24 ("While the text of the two provisions is identical, we do not presume that federal court interpretations of federal Constitutional provisions control the meaning of identical provisions in the Utah Constitution. In fact, we have not hesitated to interpret

the provisions of the Utah Constitution to provide more expansive protections than similar federal provisions where appropriate.")(internal citations omitted).

a. Misrepresentations and omissions.

The making of misrepresentations and omissions by a state actor is a violation of both forms of due process. As this Court recognized in *Walker v. State*, 624 P.2d 687, 690 (Utah 1981), "[I]t is an accepted premise in American jurisprudence that any conviction obtained by the knowing use of false testimony is fundamentally unfair and totally incompatible with 'rudimentary demands of justice.'" That principle applies equally to the use of such tactics to interfere with the parent-child relationship. *See also* p. 46-47, *supra*.[14]

b. Refusal to allow the Jensens to choose their own physician or to conduct reasonably requested tests.

As noted above, defendant Anderson admits taking the position that, if a parent's licensed physician had a different medical opinion than a licensed physician consulted by the State, the parent did not get to choose. Defendant Cunningham admits this also, in a different way: She admits that she did not consider allowing the Jensens to rely on Dr. Moore's recommendations because the person accusing the Jensens of medical neglect told her that Dr. Moore was not qualified to care for Parker. By disqualifying a physician

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[14] It is for this reason that collateral estoppel cannot be based upon rulings tainted by fraud. *Cooke v. Cooke*, 67 Utah 371, 248 P. 83, 107 (1926); *Kennedy v. Burbidge*, 54 Utah 497, 183 P. 325, 327-28 (1919) (conviction procured through "perjury, fraud, or other undue means" is "worthless" to show probable cause in malicious prosecution suit); *see also Pierce*, *supra*, 359 F.3d at 1292 (prohibition against misrepresentations is known and obvious).

solely on the say-so of a reporting doctor, Cunningham *de facto* imposed her choice of physicians on the Jensens.

Particularly when viewed in light of the common law, this Court's precedent, the history of the state and the intent of Convention delegates, these admitted actions of Anderson and Cunningham plainly violated the Jensens' state constitutional rights. Under the common law, no relationship was afforded greater protection than that of parent and child. A right that has "strong roots in the common law" suggests greater protection under the state constitution. *West*, 872 P.2d at 1013; *see also* Utah Code Ann. § 62A-4a-201(1) (2003) ("The right of a fit, competent parent to raise his child has long been protected by the laws and Constitution of this state and of the United States."); *American Bush v. City of South Salt Lake,* 140 P.3d 1235, 2006 UT 40, ¶ 43, 48 (the Framers intended that the common law be employed to interpret the state constitution); *Deseret Irr. Co. v. McIntyre*, 16 Utah 398, 52 P. 628, 629 (1898) (same).

Unlike any other state in the West, "Utah was settled primarily by two-parent families . . . ." Carrie Hillyard, "The History of Suffrage and Equal Rights Provisions in State Constitutions," 10 BYU J. PUB. L. 117, 122 (1996). At the time of the constitution, Utah recognized a presumption that a parent will fulfill his duties

> by reason of the love and affection he holds for his offspring and out of regard for the child's future welfare. . . . Indeed, the common law based the right of the father to have custody and dominion over the person of his child upon the ground that he might better discharge the duty he owed the child and the state in respect to the care, nurture, and education of the child. Before the state can be substituted to the right of the parent it must affirmatively be made to appear that the parent has forfeited his natural and legal right to the custody and control of the child by reason of his failure, inability, neglect, or incompetency to discharge the duty and thus to enjoy the right.

Mill v. Brown, 88 P. 609, 613 (Utah 1907); *see also* 2 Proceedings at 450 (Richards: "In the brute world we find the mother's love for offspring more strong than the instinct for self preservation. This is an unfailing passion throughout the whole course of organic life, whether brute or human").

Prior to ratification of the constitution, a child could be removed from the home in Utah only upon a showing of his parent's "habitual intemperance, and vicious and brutal conduct, or from vicious, brutal and criminal conduct towards said minor child." Laws 1851 to 1870, Chapter XVII, § 9. This standard was re-enacted by the first state legislature, Rev. Stat. 1898, Title 3, § 82, indicating that it was consistent with the Framers' intent. *P.I.E. Employees Federal Credit Union v. Bass*, 759 P.2d 1144, 1147 (Utah 1988) (noting that many of the first legislators were convention delegates); *Salt Lake City v. Christensen Co.*, 34 Utah 38, 95 P. 523, 526 (1908) (reenactment of statute is evidence that framers intended the law to remain as it was).

In Washington, to which the Framers looked when drafting the 1895 Constitution, the supreme court had reaffirmed a year earlier the principle that a child can be removed from a home only if the parents are affirmatively unfit, not merely because the state would prefer they make different choices. *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 37 P. 660, 661 (1894) ("courts must exercise great charity and forbearance for the opinions, methods, and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or

social standing, before a parent should be deprived of the comfort or custody of a child").

Consistent with common law and statutory history, this Court held long ago that, to be constitutional, removal of a child from his parent's custody requires an affirmative showing of unfitness. *Mill*, 88 P. at 613; *Cooke v. Cooke*, 67 Utah 371, 248 P. 83 (1926) ("[T]he unfitness which deprives a parent of the right to the custody of the child must be positive and not merely comparative, or merely speculative"); *In re B.R., et al.*, 2006 UT App 354, ¶ 87, 144 P.3d 231 (under Utah Constitution, "a parent is entitled to a showing of unfitness, abandonment, or substantial neglect before his or her parent rights are terminated"), *rev'd on other grounds*, *In re B.R.*, 2007 UT 82, 171 P.3d 435.

It is thus long settled that state actors cannot interfere with a parent's choice between licensed medical practitioners merely because they think one physician is "better" than the other, or because there is a conflict in medical opinion between the two. *See, e.g., In the Matter of Hofbauer*, 393 N.E.2d 1009, 1014 (1979) (The analysis of a parent's rights to direct medical care "cannot be posed in terms of whether the parent has made a 'right' or a 'wrong' decision, for the present state of the practice of medicine, despite its vast advances, very seldom permits such definitive conclusions. . . . Rather, in our view, the court's inquiry should be whether the parents, once having sought accredited medical assistance and having been made aware of the seriousness of their child's affliction and the possibility of cure if a certain mode of treatment is undertaken, have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority."); *State v. Perricone*, 181 A.2d 751 (N.J. 1962) (parents rejecting for religious reasons unanimous

medical opinion as to need for blood transfusions; "[h]ad there been a relevant and substantial difference of medical opinion about the efficacy of the proposed treatment or if there were substantial evidence that the treatment itself posed a significant danger to the infant's life, a strong argument could be made in favor of appellants' position"); *In re CFB*, 497 S.W.2d 831, 835 (Mo. App. 1973) (clinic's report of neglect for mother's withdrawal of child as patient was baseless; "Whether the mother's reasons for that dissatisfaction [with the clinic] were correct or incorrect is not the point. The mother had a right to choose between different doctors or institutions for the purpose of this type of care. So long as the mother was willing and intended to provide appropriate care in some manner, no finding can stand that she was guilty of neglecting the child"); *In re Tony Tuttendario*, 21 Pa. D. 561, *3 (Pa. Q. 1912) (court could not substitute its medical judgment for that of parents absent showing of unfitness; even if defective judgment were a basis for superseding parents' decision, neglect was not shown where "the science of medicine and surgery, notwithstanding its enormous advances, has not yet been able to insure an absolutely correct diagnosis in all cases, and still less an absolutely correct prognosis"). *Cf. Custody of a Minor*, 733, 379 N.E.2d 1053, 1064 (Mass. 1978) ("no dispute" as to diagnosis and need for chemotherapy; emphasizing that parent's refusal "was not based on the parents' view that another medically effective form of treatment could be found," but merely upon 'hope' of child's recovery).

Utah's constitutional framers would have been especially concerned about this aspect of Anderson and Cunningham's conduct. For decades, LDS Church members had experienced what they viewed as persecution by a government intent on imposing its own

values on the Mormon family structure, culminating in the famed polygamy prosecutions. *See State v. DeBooy*, 2000 UT 32, ¶ 32, 996 P.2d 546 (mentioning prosecutions in construing Section 7).

> "[M]any of Utah's constitutional convention delegates had either been pursued by federal authorities or were well acquainted with people who had. Because of widespread newspaper coverage, the vast majority of Utah's population was aware of the prosecutions, and the delegates to the constitutional convention had an intimate awareness of the problems posed by systematic oppression by the federal government. . . . Prior to becoming a state, the framers of the Utah Constitution suffered heavily at the hands of the federal government. These memories were fresh in the minds of the framers . . . ."

Bowers, *supra*, 2000 UTAH L. REV. at 151, 169.

The anti-polygamy campaign was directed at the disruption of families. Fathers, mothers, and sometimes children were imprisoned. Children were left without support when their parents were jailed or forced into hiding. Conditions were harsh for those targeted by the government. *See* Martha S. Bradley, "'Hide and Seek': Children on the Underground," 51 UTAH HISTORICAL QUARTERLY (1953), pp. 133-153.

In 1882, as such deprivations were on the rise, a new provision was added to the state's draft constitution, declaring that "The blessings of free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and frequent recurrence to fundamental principles." This language was restated in the 1887 version. Significantly, when its inclusion was questioned in 1895, Heber Wells stated the committee's view that it was needed in light of abuses "in the past." 1 Proceedings at 362.

That the Framers would have been repulsed by a state actor forcing a specific

health care provider on a parent is further supported by the writings of the Hon. Thomas Cooley of the Michigan Supreme Court, considered "the foremost constitutional authority in the world, perhaps," by the drafters. 1 Proceedings at 447 (Richards), 464 (Roberts), II Proceedings at 1739 (Evans); *American Bush*, 2008 UT 40 at ¶¶ 13, 49 n.16, 51.

In *Van Deusen v. Newcomer*, 40 Mich. 90, 128 (1878), Judge Cooley had concurred in ordering a new trial regarding a patient whose family had committed her to an insane asylum, stating: "I cannot admit that because one is a practitioner of medicine, it is therefore proper or safe to suffer him to decide upon mental disease, and consign people to the asylum upon his judgment or certificate." If "differences of opinion among those who are called to give scientific evidence" exist, he wrote, it would be intolerable for the patient's fate to hinge on whether "one physician rather than another happened to be called in as the adviser." *Id.* at 132.

Cunningham and Anderson's requirement that the Jensens follow the recommendations of Wagner (and, later, a board-certified pediatric oncologist in this country) instead of a licensed physician of their choosing thus violated Section 7 rights. Additionally, as discussed above, the Jensens had a right to request reasonable diagnostic testing, regardless of whether Dr. Wagner felt a need for it. Accordingly, Wagner's actions in reporting the Jensens to DCFS when they refused to commence chemotherapy without such testing violated their rights under Section 7.

c. Failure to investigate

The third type of state action evidenced by the record, Cunningham's failure to investigate medical neglect allegations (and Anderson's policy or practice permitting it)

also violated Section 7 rights. These rights require that the subject of a judicial or administrative proceeding receive an opportunity to be heard "in a meaningful way." *Worthen v. Buckley*, 926 P.2d 853, 876 (Utah 1996).

No argument is, or can be, made that the Jensens had any opportunity to be heard in the DCFS proceeding before DCFS accused the Jensens of medical neglect and sought custody of Parker. Cunningham cannot claim that she did not know how to give the Jensens this opportunity. Aside from common sense (pick up a phone), state statute spelled it out for her. *See, e.g.,* Utah Code Ann. §§ U.C.A. § 62A-4a-409(1)(a) (2003) (requiring, *inter alia*, a "thorough investigation," UTAH ADMIN. R. 512-201-1 & -201-4 (2003) (outlining required investigation). If Wagner indeed told her that it was an emergency, then Cunningham knew she had to at least ask the parents for their side of the story before seeking to remove their son from their custody. *See* p. 13-14, *supra*. Cunningham admits that none of this was done, by which the Jensens' Section 7 rights were violated as a matter of law.

3. Article I, Section 14 (search and seizure)

Article I, § 14 of the Utah Constitution states: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation . . . ." This right is "'the right to be let alone–the most comprehensive of rights and the right most valued by civilized men' that demands an independent and proper judicial determination." *DeBooy*, *supra*, 2000 UT 32, ¶ 32.

On several occasions, this Court has found the protections afforded by Section 14

to be greater than those afforded by the similarly worded Fourth Amendment to the United States Constitution. *See, e.g., id.,* ¶ 12; *State v. Larocco*, 794 P.2d 460 (Utah 1990); *see also* Bowers, *supra* at 147 ("several unique facets of Utah's history" suggest that state constitutional requirements for testimonial immunity do not mirror the federal).

"Mormon delegates likely viewed the territorial government–controlled by federally appointed non-Mormons–as oppressive. They had experienced the attempted control and suppression of their religious beliefs and practices by the federal government, often operating through territorial officials. . . . Both groups of delegates could claim that some form of authority, be it federal or local, had denied them freedom of conscience, and both were acutely aware of the threat government power presented to that freedom." *Society of Separationists*, 870 P.2d at 935.

The employment of falsehoods by government officials, as alleged here, would have been uniquely disturbing to Utah's Framers. From their perspective, LDS Church members had suffered extraordinary harm as the result of false testimony. In 1838, for example, Missouri governor Lilburn Boggs issued the notorious "extermination" order expelling Mormons from the state three days after the execution of a false affidavit by Thomas B. Marsh and Orson Hyde that claimed, among other things, that Joseph Smith intended to conquer the United States. Gary J. Bergera, "The Personal Cost of the 1838 Mormon War in Missouri: One Mormon's Plea for Forgiveness," MORMON HISTORICAL STUDIES (Spring 2003), p. 139. A month later, Missouri officials used the affidavit as a basis to jail Smith for treason. *Id.*

Seven years later, Smith was again pursued by government officials, this time in

Illinois. In reliance upon a promise of security by Governor Ford, Smith and other Mormon leaders voluntarily surrendered. Instead, Smith and his brother Hyrum were allowed to be murdered in their jail cell in Nauvoo. *See* Whitney, HISTORY OF UTAH, Vol. 1, pp. 228-30; The Church of Jesus Christ of Latter-day Saints, HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Deseret News: 1932), Vol. VII, p. 172 (Smith was arrested through "false pretense").

In 1857, William Drummond, an appointee to the territorial supreme court, falsely reported to the attorney general that Brigham Young had murdered territorial leaders, and that the Mormons had burned territorial records and committed treason. *See* Andrew L. Neff, *History of Utah* (ed. Leland H. Creer, Salt Lake City: Deseret News, 1940), Vol. 1, pp. 448-51. President Buchanan, with whom church leaders were already at strife, cited Drummond's assertions as evidence that the Mormons were in rebellion, and dispatched the Army to Utah to replace Young as governor by force. *Id.*

Young issued a proclamation decrying, again, deception by government officials: "For the last twenty five years we have trusted officials of the Government, from Constables and Justices to Judges, Governors, and Presidents, only to be scorned, held in derision, insulted and betrayed." Proclamation, August 5, 1857; *id.* ("We know these aspersions are false, but that avails us nothing"). More than 30,000 Mormons evacuated northern Utah in anticipation of invading forces. Hubert Howe Bancroft, HISTORY OF UTAH 1540-1886 (San Francisco, The History Company: 1889), p. 535.

In 1871, Brigham Young was indicted by territorial officials for an 1857 murder based upon the false affidavit of a man named William Hickman, who was "in collusion

with the crusading officials to bring trouble upon his former brethren." Whitney, HISTORY OF UTAH, pp. 629-640. Young was denied bail and spent four months under house arrest; two of his alleged co-conspirators spent six months in jail. Bancroft, pp. 663-64.

Apart from the Framers' intent, there is a more basic reason why Section 14 protected the Jensens from the defendants' actions: By its plain language, Section 14 prohibits "unreasonable" searches and seizures, and the issuance of warrants not based upon oath or affirmation. The use of material misrepresentations and omissions to effectuate a seizure is inherently unreasonable. Similarly, obtaining a warrant or court order through false oath or affirmation cannot satisfy the requirements of Section 14.

The federal court rejected the Jensens' argument that non-custodial (non-physical) seizures are encompassed within the Fourth Amendment of the federal constitution, but there is no question that Section 14's protections extend to such seizures. Indeed, if there is one state where that would be true, it is Utah.

A custodial seizure is, as the term suggests, a physical restraint of liberty. Daren Jensen underwent a custodial seizure when he was arrested and incarcerated in Idaho in August 2003, and Barbara and Daren Jensen were both seized when they were booked and released in Utah in September 2003.

A non-custodial seizure is one that results from state-imposed conditions that significantly, but not physically, restrict liberty. See *Albright v. Oliver*, 510 U.S. 266, 278, 114 S.Ct. 807 (1994) (Ginsburg, J., concurring) (a citizen may be subject to state imposed conditions that restrict liberty, including conditions of bail, mandatory court

appearances, restrictions on freedom to travel, diminishment of employment prospects, reputational harm, and "the financial and emotional strain of preparing a defense." *See also id.* at 307 (Justices Souter and Stevens concurring in Justice Ginsberg's view of continuing seizure).

The Framers unquestionably had such seizures in mind when they adopted Article I, § 14 of the Utah Constitution. Many members of the Church had been forced into hiding or to abandon their families during the 1880s, which was no less an infringement of their physical liberty than an arrest. (LDS Church President John Taylor had died while in hiding in 1887, less than a decade before the constitution was adopted.) The Framers were very aware that a deprivation of freedom by the government can take forms beyond physical restraint.

In this case, the Jensens were unable to return to their home state without the threat of arrest and removal of their child. They were unable to take their child for an evaluation in Houston, or to other physicians of their choosing. They were subjected to mandatory court appearances. They were ordered to give up their passports. Daren Jensen lost his job, and was exposed to diminishment of other employment prospects, both because he was terminated from his previous job, and because he had to devote his time, finances, energy and efforts to attempting to protect his and his family's rights. The Jensens were held up to public ridicule and contempt, and subjected to media scrutiny.

These facts rise to the level of a seizure under Article I, § 14 of the Utah Constitution. *See also Murphy v. Lynn*, 118 F.3d 938, 945 (2nd Cir. 1997) (post-arraignment order prohibiting an arrestee from leaving the State of New York and

requiring that he attend court appointments amounted to a "seizure" under Fourth Amendment); *Evans v. Ball*, 168 F.3d 856, 860-61 (5th Cir.1999) (overruled on other grounds by *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir.2003)) (holding that a plaintiff had alleged Fourth Amendment seizure where, in addition to being summoned to appear and answer to charges, plaintiff was forced to sign personal recognizance bond, and was required to report regularly to pretrial services and obtain permission before leaving the state); *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3rd Cir.1998) (finding seizure where plaintiff was required to post $10,000 bond, attend all court hearings, maintain weekly contact with pretrial services, and refrain from traveling outside New Jersey and Pennsylvania); *Sassower v. City of White Plains*, 992 F.Supp. 652, 656 (S.D.N.Y.1998).

II. RES JUDICATA IS INAPPLICABLE TO THE JENSENS' STATE CLAIMS FOR ADDITIONAL REASONS.

Res judicata is an affirmative defense, and thus the defendants bore the burden of proving that each of the elements was present as a matter of law. *Timm v. Dewsnup*, 851 P.2d 1178, 1184 (Utah 1993). Apart from the trial court's error in concluding that the state constitution did not afford broader protections than the federal, addressed *supra*, the trial court's application of res judicata was error for additional reasons.

"[R]es judicata has two branches: claim preclusion and issue preclusion." *Murdock v. Springville Mun. Corp.*, 1999 UT 39, ¶ 15, 982 P.2d 65. In their motions below, the defendants argued that the Jensens' state claims were barred under both prongs. In ruling that "res judicata" applied, the trial court did not identify a particular branch; accordingly, both are addressed.

A. Claim preclusion does not apply.

"In general terms, claim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously." *Brigham Young University v. Tremco Consultants, Inc.*, 2005 UT 19, 110 P.3d 678. When a party seeks the application of claim preclusion based upon a prior federal judgment, Utah courts apply federal res judicata law. *See Massey v. Board of Trustees of Ogden Area Community Action Comm.*, 2004 UT App 27, ¶¶ 6-7, 86 P.3d 120.

Under federal law, claim preclusion applies only if the party asserting the doctrine establishes three elements: "(1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Pelt v. Utah*, 539 F.3d 1271 (10th Cir. (Utah) 2008). One or more of those elements is not present in this case.

1. There was no earlier action.

Claim preclusion looks to the causes of action that were filed in an *earlier* proceeding. *Pelt, supra*, at 1281; *Oman*, 2008 UT 70, ¶ 31. Here, there was no "earlier proceeding." All of the claims were filed in the same lawsuit in the same court at the same time. Defendants' removal of the case to federal court did not convert this single case into two cases. *See Payne for Hicks v. Churchich*, 161 F.3d 1030, 1037 (7th Cir. 1998) ("this situation does not involve two separate lawsuits, one in state court and another in federal court. Rather, it involves *one suit* that originated in state court and that was removed to federal court."); *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031 (10th Cir. 2000) ("Res judicata does not speak to direct attacks in the same case, but

rather has application in subsequent actions.")

2. There was no "final judgment on the merits" on the Jensens' state law claims.

Res judicata does not apply if a court dismissed prior claims for want of jurisdiction, or other grounds not going to the merits. *Hughes v. United States*, 4 Wall. 232, 71 U.S. 232, 18 L.Ed. 303 (1866); *Park Lake Res. Ltd Liab. Co. v. USDA*, 378 F .3d 1132, 1136 (10th Cir. 2004); *Snyder v. Murray City Corporation*, 73 P.3d 325, 2003 UT 12, ¶ 36 (where a federal court dismisses a plaintiff's state constitutional and common law claims without prejudice and declines to exercise supplemental jurisdiction, neither claim or issue preclusion applies). In this case, the federal court went out of its way *not* to rule on the Jensens' state law claims, which it said included "important" state constitutional issues that should be decided by a state court.

3. The Jensens' state claims are separate and distinct from the claims ruled upon by the federal court.

The appellees argued below that, because the Jensens rely on the same underlying facts to support their claims under the Utah Constitution as were relied upon in federal court, their state and federal claims must be identical, warranting the application of claim preclusion to the state claims. However, the Jensens have demonstrated how and why the rights afforded in the Utah Constitution protected them from the alleged misconduct, which necessarily distinguishes the claims from those under the federal constitution (as construed by Judge Stewart, who found no protection under the latter). *See* pp. 37-62, *supra*. (Additionally, the federal court did not purport to address the Jensens' state common law claims, which are inherently distinct from constitutional claims.)

4. The policy justifications behind the doctrine of claim preclusion are not present in this case.

"The fundamental policies underlying the doctrine of res judicata (or claim preclusion) are finality, judicial economy, preventing repetitive litigation and forum-shopping, and 'the interest in bringing litigation to an end.'" *Plotner v. AT & T Corp.*, 224 F.3d 1161 (10th Cir. 2000). These policies are not implicated in this case. First, any policy related to finality is not implicated by the procedural stance of this case, because the Jensens' state law claims have been pending since the inception of the case, and have never been ruled upon by any court.

Nor is judicial economy at risk. The Jensens do not seek to waste judicial resources; they ask only for their day in court on their state law claims. No judicial energy was expended on the state law claims by the federal court, as the claims were not addressed. As to the policy of preventing repetitive litigation and forum shopping, the Jensens have filed only one action in one court. It was not the Jensens who removed this case to federal court (a tactic more akin to "forum shopping"), but the defendants. Finally, the policy related to "bringing litigation to an end" is inapplicable here, because the Jensens' state law claims have been pending since the inception of this case, and were never considered by the federal court.

B. Issue preclusion

Defendants also argued below that the second prong of res judicata, issue preclusion, barred the Jensens' state claims. "Collateral estoppel, or, in modern usage, issue preclusion, 'means simply that when an issue of ultimate fact has once been

determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Schiro v. Farley*, 510 U.S. 222, 232, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994). Again, however, this component of res judicata does not apply because there is no "future lawsuit"; it is the same case in which the claims were originally filed.

The elements of issue preclusion would not be met in any event. As noted earlier, federal res judicata law applies if a party is attempting to bind a state court to a federal court ruling. Under Tenth Circuit law, a party arguing issue preclusion must establish four elements as a matter of law:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Burrell v. Armijo, 456 F.3d 1159 (10th Cir. 2006).

1. The issues presented for review in this action are not identical to the issues decided by the federal court.

The legal issues before this Court are different than the legal issues considered and applied in the federal court proceeding. The federal court applied federal law of absolute immunity, qualified immunity, substantive and procedural due process under the Fourth and Fifth Amendments to the United States Constitution, and malicious prosecution under the Fourth Amendment to the United States Constitution. Here, this Court is applying state law, including Article I, Sections 1, 7 and 14 of the Utah Constitution, and the common law of this state applicable to intentional infliction of emotional distress and

wrongful initiation of civil and criminal process.

Furthermore, the factual issues that were considered by the federal court are not identical to the issues in the state claims. Factual issues are necessarily measured by reference to legal standards. In other words, without reference to a law or legal standard, it is impossible for a Court to determine whether a particular fact is material or not. (For example, a statement might be material to a claim for defamation, while immaterial to a claim for breach of contract.) When dealing with causes of action arising under a distinct legal theory and source of right, the factual issues implicated are likewise distinct.

The trial court also should not defer to federal court rulings that would be impermissible in state court. Under Utah law, for example, a party's intent is generally regarded as an issue of fact. *See, e.g., Lysenko v. Sawaya*, 7 P.3d 783, 2000 UT 58, ¶ 17; *see also IHC Health Services, Inc. v. D & K Management, Inc.*, 196 P.3d 588, 2008 UT 73, ¶ 18 (Utah 2008) (citations omitted) (state court may not grant summary judgment "if the facts shown by the evidence on a summary judgment motion support more than one plausible but conflicting inference on a pivotal issue in the case . . . particularly if the issue turns on credibility or if the inferences depend upon subjective feelings or intent.").

Thus, for example, the federal court's findings that misrepresentations by defendants Wagner and Cunningham were not made "deliberately" (*see, e.g.,* Exh. 3 at 38, 40, 46, 52, 55) would be impermissible on summary judgment in state court. (That finding also did not address the Jensens' alternative argument that the misrepresentations were made recklessly.)

Similarly, the federal court's finding that one or more of the defendants acted

"reasonably" as a matter of law (*see, e.g.,* Exh. 3 at 38, 42) is inconsistent with Utah law, under which "questions of reasonableness necessarily pose questions of fact which should be reserved for jury resolution." *Ilott v. University of Utah*, 2000 UT App 286, ¶ 18, 12 P.3d 1011, citing *Williams v. Melby*, 699 P.2d 723, 727-28 (Utah 1985).

The federal court's factual findings improperly resolved credibility issues in favor of the defendants, and construed evidence in favor of the moving party. For example, the district court made a finding of fact that "Dr. Corwin and Mr. Jensen unsuccessfully attempted to schedule a further meeting to discuss the situation" (Exh. 3 at 6), when both Dr. Corwin and Daren Jensen testified that they had scheduled a meeting, but that Dr. Wagner nixed it. *See* p. 12, *supra*. This finding is important because, not only does it imply that the Jensens were unwilling to have further discussions about PJ's situation, but this meeting would have been an opportunity for the Jensens to explain their position to the DCFS liaison (who was operating under an erroneous assumption that Wagner had run all available confirmatory testing), and potentially for Dr. Moore to explain her questions about the diagnosis.

Another example of the federal court construing evidence in a light most favorable to the defendants is observed in its acknowledgement that fresh tissue was available in Parker's mouth for new testing, followed by: "However, this would have required further surgery to obtain a sample." (Exh. 3 at 4). This characterization reflects an effort to excuse Dr. Wagner's unprecedented refusal to seek such testing, ignores Dr. Albritton's testimony that removing the remaining tissue would have alleviated her concerns that the tumor might spread, exaggerates the minor outpatient procedure of snipping additional

tissue, and downplays the alternative that might be avoided (45 weeks of chemotherapy). *See* p. 8, *supra*. The federal court's ruling is replete with such defense-friendly characterizations, which would be improper in state court on summary judgment.

2. The "prior action" was not "finally adjudicated on the merits."

As discussed above, there was no "prior action" but rather a single case, so this threshold element of issue preclusion fails. Moreover, again there was no final adjudication on the merits, at least with respect to plaintiffs' state law claims, because the federal court never reached those claims.

3. Policy considerations militate against applying the doctrine of collateral estoppel.

The Tenth Circuit recognizes that in certain instances issue preclusion should not be applied, for example, where the application of issue preclusion "would 'do[ ] nothing to vindicate two primary policies behind the doctrine, conserving judicial resources and protecting parties from 'the expense and vexation' of relitigating issues that another party previously has litigated and lost.'" *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Com'n*, 327 F.3d 1019, 1030 (10th Cir. 2003).

In addition, this Court has recognized that "collateral estoppel can yield an unjust outcome if applied without reasonable consideration and due care." *Buckner v. Kennard*, 2004 UT 78, ¶ 15, 99 P.3d 842. Accordingly, courts "must carefully consider whether granting preclusive effect to a prior decision is appropriate. . . . Collateral estoppel 'is not an inflexible, universally applicable principle[.] . . . Policy considerations may limit its use where . . . the underpinnings of the doctrine are outweighed by other factors.' " *Id.*

(alterations in original) (citation omitted).

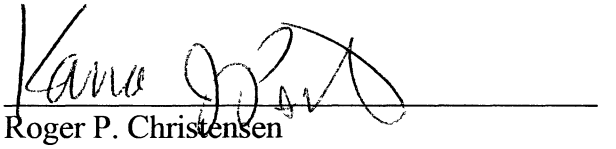
Such policy considerations are present in this case. The Utah Constitution is the "supreme law" of the state of Utah. Under the primacy approach, this Court typically examines state constitutional issues first, and considers federal law of no more persuasive weight than case law from a sister state. *State v. Tiedemann*, 162 P.3d 1106, 2007 UT 49 ¶ 33; *State v. Worwood*, 164 P.3d 397, 2007 UT 47, ¶ 15. Deferring to a federal court is detrimental to, not consistent with, state policy.

CONCLUSION

For the reasons set forth above, plaintiffs/appellants respectfully request the Court reverse the trial court's judgment and remand the case for trial.

RESPECTFULLY SUBMITTED this 28th day of August, 2009.

CHRISTENSEN & JENSEN, P.C.



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CERTIFICATE OF SERVICE

This is to certify that on the 28th day of August, 2009, two true and correct copies of the foregoing BRIEF OF APPELLANTS were mailed, first-class postage prepaid, to:

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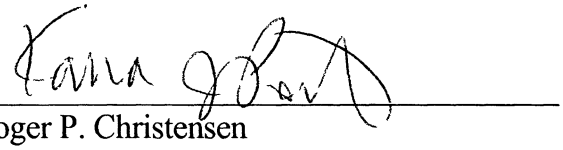

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ADDENDUM

Memorandum Decision, February 18, 2009

Final Judgment and Order, March 11, 2009

Memorandum Decision (Judge Ted Stewart), September 22, 2008

Exhibit 1 Memorandum Decision, February 18, 2009

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BARBARA JENSEN et al., Plaintiffs, vs. STATE OF UTAH; et al., Defendants.	MEMORANDUM DECISION Case No. 050912502 Hon. JOSEPH C. FRATTO, JR.

The above-entitled matter comes before the Court pursuant to Defendant Cunningham's Motion for Summary Judgment, Defendant Anderson's Motion for Summary Judgment, Defendants Wagner and Albritton's Motion for Summary Judgment, and Defendant Eiseman's Motion for Summary Judgment. The Court heard oral argument with respect to the motions on January 26, 2009. Following the hearing, the matters were taken under advisement.

The Court having considered the motions, memoranda, arguments of counsel, as well as the decision of Judge Stewart, finds it clear that Plaintiffs have pled the same factual basis for their Causes of Action and further, that all the claims arise from a single set of operative events. Indeed, the factual events pled in the instant mirror those which supported Plaintiffs' federal claims. Moreover, Judge Stewart, after an extensive analysis of the facts, made findings and conclusions based on the issues underlying Plaintiffs' claims.

The aforementioned in mind, the Utah Supreme Court in the similar case of *Oman v. Davis Sch. Dist.*, 2008 UT 70, (Utah 2008) stated the following:

> The doctrine of res judicata embraces two distinct theories: claim preclusion and issue preclusion." Buckner v. Kennard, 2004 UT 78, P 12, 99 P.3d 842. This appeal raises only the latter principle of issue preclusion. Issue preclusion, which is also known as collateral estoppel, "prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit." Id. (internal quotation marks omitted). The purposes of issue preclusion include "(1) preserving the integrity of the judicial system by preventing inconsistent judicial outcomes; (2) promoting judicial economy by preventing previously litigated issues from being relitigated; and (3) protecting litigants from harassment by vexatious litigation." Id. P 14.

Id. at P28.

The *Oman* court continued stating:

> Issue preclusion applies only when the following four elements are met: (I) the party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits. Collins v. Sandy City Bd. of Adjustment, 2002 UT 77, P 12, 52 P.3d 1267 (internal quotation marks omitted).

Id. at P29.

Applying the aforementioned to the facts of this case, there can be no question each of the elements has been satisfied. While Plaintiffs argue there was no final adjudication on the merits because the federal court never reached the state law claims, a review of Plaintiffs' Complaint and the federal court's Memorandum Decision demonstrates that the factual contentions and issues supporting the state claims are identical to those underlying the federal claims and were necessary to Judge Stewart's decision. Indeed, in response to a similar argument by the plaintiff in *Oman* regarding his breach of contract claim, the Court stated:

> Underlying the § 1983 claim was the dispositive issue of whether the District breached the Classified Agreement when it fired Oman for cause. Indeed, when Oman filed his complaint in federal court, his basis for the § 1983 cause of action was twofold: (1) that the District's "pre-termination conduct deprived him of due process rights secured by the Fifth and Fourteenth Amendments to the United States Constitution," and (2) that the District's "decision to suspend, and later terminate, his employment violated the terms of the Classified Agreement." Thus, a resolution of the § 1983 claim, as framed by Oman, required the federal court to resolve the underlying issue of whether the District violated the Classified Agreement when it fired Oman. The issue was squarely before the federal court, was litigated by the parties, and was necessary to the court's final

> judgment on the § 1983 claim. Accordingly, the federal court made findings and conclusions regarding the alleged breach of contract--including the previously quoted conclusion that the District had a sufficient basis for firing Oman for cause under the Classified Agreement--and these findings and conclusions are binding in subsequent actions under the doctrine of issue preclusion.
>
> Although Oman's breach of contract claim was not litigated in the federal court, it is based upon the same underlying issue that was resolved by the federal court: whether the District had a sufficient basis for terminating Oman for cause under the Classified Agreement. The state district court was therefore bound by the federal court's conclusion that "[Oman]'s representations to the District regarding his work hours provided a sufficient basis for termination for cause." Accordingly, even if Oman had argued to the district court that his conduct did not give the District a basis for terminating him for cause, the argument would have failed based on the federal court's prior ruling.

Id. at P33.

As noted, the issues in this case arise from a single, distinct set of events and as demonstrated by the Memorandum Decision of Judge Stewart, the factual contentions that underlie the Plaintiffs' state law claims against the Defendants have been conclusively decided.

This said, Judge Stewart's legal conclusions bar Plaintiffs' claims under the Utah Constitution because there is no historical

or textual basis for interpreting Utah's Constitutional provisions in this case differently from the Federal Constitution. Moreover, no Utah appellate decision supports interpreting the Utah Constitution to provide broader or different rights in this case.

In sum, the facts, the alleged harm, and the analysis of Plaintiffs' state law claims are the same as those already considered and dismissed by Judge Stewart and, there being no additional or different rights provided by the Utah Constitution, dismissal is appropriate in this forum as well.

Defendant Cunningham's Motion for Summary Judgment, Defendant Anderson's Motion for Summary Judgment, Defendants Wagner and Albritton's Motion for Summary Judgment, and Defendant Eiseman's Motion for Summary Judgment are granted.

DATED this 18th day of February, 2009.

JOSEPH C. FRATTO, JR.
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050912502 by the method and on the date specified.

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Case No: 050912502
Date: Feb 18, 2009

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Dated this 18 day of Feb, 2009.

lm
Deputy Court Clerk

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE COUNTY

Exhibit 2 Final Judgment and Order, March 11, 2009

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PARKER JENSEN, a minor, by and through his parents and natural guardians, BARBARA and DAREN JENSEN; BARBARA JENSEN, individually; and DAREN JENSEN, individually,

Plaintiffs,

v.

STATE OF UTAH; INTERMOUNTAIN HEALTH CARE, INC.; KARI CUNNINGHAM, in her individual capacity; RICHARD ANDERSON, in his individual and official capacities; LARS M. WAGNER, in his individual capacity; DAVID L. CORWIN, in his individual capacity; CHERYL M. COFFIN, in her individual capacity; KAREN H. ALBRITTON, in her individual capacity; SUSAN EISENMAN, in her individual capacity; and JANE and JOHN DOE, in their individual capacities,

Defendants.

FINAL JUDGMENT AND ORDER

Civil No.: 050912502

Judge Joseph C. Fratto

Pursuant to the Court's Memorandum Decision issued on February 18, 2009, and for the reasons set forth in the defendants' moving papers addressing res judicata, defendants' motions for summary judgment are hereby granted and all claims against the defendants are hereby dismissed with prejudice on the merits.

DATED this 6th day of March, 2009.

THE COURT

Hon. Joseph C. Fratto

Approved as to Form:

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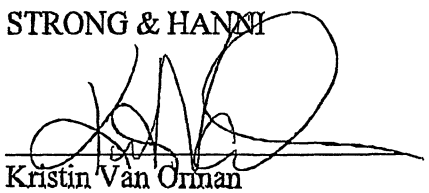

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Attorney for Defendant Anderson

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Roger P. Christensen
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of a proposed **FINAL JUDGMENT AND ORDER** by U.S. Mail, postage prepaid, to the following:

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Attorneys for Susan Eisenman

On this 6th day of ~~February,~~ March 2009

Celinne W. Barker

Exhibit 3 Memorandum Decision (Judge Ted Stewart), September 22, 2008

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

P.J., a minor, by and through his parents and natural guardians, BARBARA and DAREN JENSEN, et al., Plaintiffs, vs. STATE OF UTAH, et al., Defendants.	MEMORANDUM DECISION AND ORDER GRANTING SUMMARY JUDGMENT AND REMANDING STATE LAW CLAIMS Case No. 2:05-CV-739 TS

This § 1983 case arises from a protracted dispute between Plaintiffs Daren and Barbara Jensen and the State of Utah regarding the proper medical care for their son, Plaintiff P.J. Currently before the Court are the summary judgment motions of Defendants Richard Anderson, Kari Cunningham, Susan Eisenman, Dr. Lars Wagner, and Dr. Karen Albritton. After carefully considering the parties' submissions and having heard oral argument, the Court will grant the summary judgment motions with regard to the Jensens' § 1983 claims for the reasons discussed below. As the Jensens' state law claims involve important issues of Utah law, the Court declines to exercise supplemental jurisdiction and will remand the state claims to the Utah court from which they were removed.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.[1] In considering whether genuine issues of material fact exist, the Court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented.[2] The Court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party.[3]

II. FACTS

The following is a summary of the factual background in this case, viewed in the light most favorable to the Jensens: On April 30, 2003, 12-year-old P.J. had a small growth removed from the floor of his mouth by an oral surgeon named Dr. Christensen. The tissue removed by Dr. Christensen was sent to Laboratory Corporation of America in Kent, Washington for analysis. LabCorp informed Dr. Christensen that the sample was malignant. Dr. Christensen then referred P.J. to Dr. Harlan Munz at Primary Children's Medical Center ("PCMC") in Salt Lake City, Utah.

The Jensens met with Dr. Munz on May 9, 2003. After examining P.J., Dr. Munz referred him to PCMC's oncology department where he met with Dr. Wagner. Dr. Wagner first

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[1]*See* Fed. R. Civ. P. 56(c).

[2]*See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir. 1991).

[3]*See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991).

met with and examined P.J. that same day, but could not offer any diagnosis until after PCMC's pathology department completed its own testing.

Upon PCMC's request, LabCorp sent P.J.'s tissue sample to PCMC's pathology department. On May 20, 2003, Dr. Lowichik completed the pathology report on P.J.'s tissue, diagnosing the growth as "EWING SARCOMA/PERIPHERAL PRIMITIVE NEUROECTODERMAL TUMOR"[4] (*i.e.*, Ewing's Sarcoma). This diagnosis was rendered based on immunohistochemical staining and the appearance of the tumor cells. The pathology report indicates that P.J.'s "case was reviewed by [fellow pathologist] [Dr. Coffin] who concurs with this interpretation."[5] The deposition testimony of the pathologists likewise indicates that both of them reviewed the testing and were confident in the diagnosis. Dr. Lowichik estimated her confidence in the diagnosis to be "in the high 90 percent."[6] Dr. Coffin reviewed the testing and was also very confident that the tumor was Ewing's Sarcoma. In fact, Dr. Coffin testified that the diagnosis was rendered with near certainty.

In addition to immunohistochemical staining, Ewing's Sarcoma may be diagnosed through cytogenetic and molecular genetic testing. Ewing's cells often manifest a chromosomal translocation (an "11;22 translocation"), which may be detected through these tests. The presence of an 11;22 translocation indicates that a specimen is Ewing's Sarcoma. Cytogenetic testing may be performed only on fresh or frozen tissue. Where a tissue sample is placed in

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[4]Docket No. 345, Ex. 32.

[5]*Id.*

[6]Docket No. 334, Ex. 4, at 31.

formalin or paraffin, cytogenetic testing is not possible. Although not optimal, molecular testing can be performed on tissues samples that have been placed in formalin or paraffin.

In 2003, PCMC would commonly attempt to conduct cytogenetic testing on sarcoma tissue samples that were excised at PCMC where "there was adequate sample left over after the standard pathology examination."[7] Molecular testing was available through an affiliated institution. In 2003, it would not have been unusual for a PCMC pathologist to send samples out for molecular testing to provide further diagnostic information.

Because the tissue removed from P.J.'s mouth by Dr. Christensen was placed in formalin or paraffin, cytogenetic testing could not be performed on that specimen. There were still tumor cells in P.J.'s mouth, which could have been extracted for this purpose. However, this would have required further surgery to obtain a sample. In contrast, molecular testing could have been performed on the tissue sample obtained by Dr. Christensen.

Dr. Wagner discussed the diagnosis of P.J.'s tissue sample with Dr. Coffin. She told him that she was confident in the diagnosis and that no further testing was needed. According to Dr. Coffin, where the cell appearance and immunohistochemical staining fit "the criteria for the diagnosis of Ewing's sarcoma," it is not necessary to perform cytogenetic or molecular testing to establish the diagnosis.[8]

On May 21, 2003, Dr. Wagner met with the Jensens for more than an hour. Dr. Wagner expressed his confidence in the Ewing's Sarcoma diagnosis and explained the need for chemotherapy to begin right away. Dr. Wagner further explained the difference between

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[7]Docket No. 345, Ex. 15, at 23.

[8]Docket No. 334, Ex. 3, at 43-44.

localized and non-localized Ewing's Sarcoma. Specifically, Dr. Wagner informed the Jensens that the cure rate for localized disease—where there is no evidence of cancer in places other than where it was discovered—was approximately 70% when treated with the recommended chemotherapy, but that the cure rate for non-localized (metastatic) disease was as low as 20%. Thus, Dr. Wagner explained the necessity of beginning treatment right away to prevent the cancer from spreading throughout P.J.'s body.

That same day, radiographic examinations were performed on P.J.'s neck, thorax, chest, and skull to determine whether the cancer had spread beyond the floor of P.J.'s mouth. Each of these tests returned negative. Ms. Jensen testified that at this point they asked Dr. Wagner "if there was any other test he could run to help confirm that it was Ewing's and he said no."[9] "He was sure it was Ewing's."[10]

During the May 21, 2003 visit, the Jensens asked Dr. Wagner to have P.J.'s tissue sample sent to the Dana-Farber Cancer Institute at Harvard University for a second opinion. Dr. Wagner informed the Jensens that insurance companies often would not pay for a second opinion and encouraged them to contact their insurance provider. Nonetheless, Dr. Wagner agreed to the second opinion and sent the tissue sample to Dana-Farber as requested. The Jensens ultimately cancelled the Dana-Farber consultation.

The Jensens met with Dr. Wagner again on May 29, 2003. At this meeting the Jensens asked Dr. Wagner to order a Positron Emission Tomography ("PET") scan. Dr. Wagner refused to order a PET scan, explaining that it would not be useful in P.J.'s situation because there was

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[9]Docket No. 345, Ex. 12, at 127.

[10]*Id.* at 134.

no other evidence of metastatic disease. Dr. Wagner further explained to the Jensens that a negative PET scan would not change the need for chemotherapy. The Jensens again asked Dr. Wagner if there were other tests to confirm the Ewing's diagnosis. Dr. Wagner said no.

By early June 2003, the Jensens and Dr. Wagner differed significantly in their views regarding P.J.'s medical care. Accordingly, a meeting between the Jensens, Dr. Wagner, Dr. Lemons (head of the oncology department), a PCMC social worker, and PCMC's head of quality assurance was scheduled for June 9, 2003, at PCMC. Dr. Wagner again emphasized the need to begin treating P.J. with chemotherapy right away in order to prevent the cancer from spreading. The Jensens' statements during the meeting are disputed. The Jensens contend that they refused to consent to the proposed chemotherapy based on their desire for further confirmatory tests. Dr. Wagner contends that they refused chemotherapy because they wanted to pursue an alternative treatment called Insulin Potentiation Therapy. Regardless, the parties were unable to resolve the impasse. During the meeting, the PCMC head of quality assurance told the Jensens that a referral to the Division of Child and Family Services ("DCFS") might be necessary. The Jensens left the meeting, telling the PCMC representatives, "You're fired."[11]

At some point, Dr. Corwin of Safe and Healthy Families—a division of PCMC with the responsibility of ensuring that patients are not left untreated—became involved in P.J.'s case. Around June 12, 2003, Dr. Corwin attempted to make contact with the Jensens. Dr. Corwin and Mr. Jensen had a lengthy telephone conversation on June 15, 2003, but were unable to reach an agreement as to P.J.'s medical care. Dr. Corwin and Mr. Jensen unsuccessfully attempted to schedule a further meeting to discuss the situation. At that point, the decision was made to refer

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[11] *Id.*, Ex. 13, at 181.

P.J.'s case to DCFS for medical neglect in refusing what the doctors believed was medically necessary treatment.

On June 16, 2003, a regularly-scheduled meeting was held at PCMC with representatives from DCFS, PCMC, and other community organizations in the child welfare system. Dr. Wagner and Dr. Corwin were also present. At this meeting, and in a case summary submitted to DCFS, Dr. Wagner summarized his interaction with the Jensens. A formal referral to DCFS was made that same day. The parties dispute whether it was Dr. Corwin or Dr. Wagner who actually submitted the referral. For purposes of the summary judgment motions, the Court must presume the latter.

DCFS assigned P.J.'s case to Ms. Cunningham, a DCFS social worker. Dr. Wagner and Dr. Corwin provided Ms. Cunningham with information regarding their understanding of P.J.'s situation, both orally and by written case summaries. Ms. Cunningham was also present at the June 16, 2003 meeting at PCMC. Based on communications with Dr. Wagner, Ms. Cunningham was under the impression that P.J.'s situation was a medical emergency and that something needed to be done within a matter of hours or days.

On June 18, 2003, Ms. Cunningham, through Assistant Attorney General Lund, filed a Verified Petition and Motion to Transfer Custody and Guardianship (the "Verified Petition") in the Third District Juvenile Court for Salt Lake County, Utah (the "Juvenile Court"). Ms. Cunningham filed the Verified Petition based entirely on the information provided to her by Drs. Wagner and Corwin. She did not do any independent investigation of P.J.'s referral.

On June 20, 2008, the Jensens first appeared before the Juvenile Court. Ms. Eisenman represented DCFS in place of Ms. Lund and became the primary Assistant Attorney General on P.J.'s case. At that hearing, the Jensens' attorney, Mr. Frank Mylar, represented that the Jensens

were interested in obtaining further tests of the tissue sample excised by Dr. Christensen. The Court continued the hearing until July 10, 2003, as the parties indicated that a stipulation regarding P.J.'s treatment was possible.

Around this time, the Jensens sought out Dr. Birkmayer, who practiced in Vienna, Austria. After reviewing P.J.'s medical records, Dr. Birkmayer indicated to the Jensens that he was not "totally convinced" that P.J. had Ewing's Sarcoma and that chemotherapy was not necessary.[12] The Jensens expressed their desire to have Dr. Birkmayer supervise P.J.'s treatment. On July 2, 2003, Ms. Eisenman sent an email to Dr. Birkmayer in which she asked questions regarding, among other things, Dr. Birkmayer's qualifications and licensure and whether Austria had a standard of care similar to that used by the American Academy of Pediatrics. After receiving Ms. Eisenman's email from Dr. Birkmayer, Mr. Mylar instructed Ms. Eisenman not to contact Dr. Birkmayer directly, but to direct inquiries regarding Dr. Birkmayer to Mr. Mylar. According to Mr. Jensen, the Jensens abandoned their desire to have Dr. Birkmayer treat P.J. at that time because DCFS was requiring that P.J.'s medical care be provided by a board-certified pediatric oncologist.

In late June 2003, Dr. Wagner left Utah to pursue a new job in Ohio. He informed Ms. Eisenman that he was leaving and that she could contact Dr. Lemons or Dr. Albritton if she needed anything. In preparation for the July 10, 2003 hearing, Ms. Eisenman disclosed to the Juvenile Court that she intended to prove her case using three medical experts: Drs. Coffin, Wagner, and Albritton. In preparation for the hearing, Ms. Eisenman provided Dr. Albritton

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[12]Docket No. 345, Ex. 48. Notably, Plaintiffs represent that they submit Dr. Birkmayer's statements only to illustrate the effect they had on the Jensens' mental state and not for the truth of the matter asserted.

with materials related to the case, including Dr. Wagner's case summary and a list of questions that might be asked. Mr. Mylar objected to the introduction of testimony at the July 10, 2003 hearing because the hearing was set for a pre-trial conference and not an evidentiary hearing. The Juvenile Court affirmed the objection and Drs. Albritton and Coffin did not testify at that time.

At the July 10, 2003 hearing, the Jensens again raised the issue of whether P.J. really had Ewing's Sarcoma. The parties stipulated that the Jensens would have P.J. examined by doctors at the Children's Hospital of Los Angeles ("CHLA") and that the Jensens would abide by their treatment recommendations. The Juvenile Court set another pretrial conference for July 28, 2003. Per the stipulation, the Jensens traveled to Los Angeles, where P.J. met with Dr. Tishler on July 21, 2003. At this meeting, Dr. Tishler informed the Jensens that he was recommending chemotherapy based on the prior pathology tests, but that CHLA would do its own pathology analysis and genetic testing to confirm the Ewing's Sarcoma diagnosis. The Jensens were unhappy with this result as they believed that Dr. Tishler was not performing an independent evaluation, but was merely deferring to the PCMC doctors.

Based on this dissatisfaction, the Jensens did not return again to CHLA, but instead sought medical care from Dr. Charles Simone. Dr. Simone initially agreed to treat P.J. However, upon learning of the legal battle in which the Jensens were entrenched, Dr. Simone declined involvement. Nonetheless, the Jensens believed that Dr. Simone would still agree to treat P.J. if the Juvenile Court would permit it.

At the hearing on July 28, 2003, the Juvenile Court received a report from Dr. Tishler via telephone regarding P.J.'s evaluation at CHLA. Dr. Tishler indicated that to his knowledge the CHLA testing was not yet complete. However, he also stated that there was no question that P.J.

had a malignant tumor that would require chemotherapy right away and that the remaining pathological and radiological tests would serve only to clarify what type of tumor he had for purposes of tailoring the chemotherapy to P.J.'s needs. The Jensens' new attorney, Mr. Blake Nakamura, advocated the Jensens' concern that not all of the testing had been completed. Nonetheless, based on Dr. Tishler's testimony, the Juvenile Court ordered that P.J. commence chemotherapy before August 8, 2003, without regard to the CHLA test results. The Juvenile Court also provided that should the test results indicate that chemotherapy was not needed, the Jensens were free to bring that fact to the Juvenile Court's attention.

Mr. Nakamura also represented to the Juvenile Court at the July 28 hearing that the Jensens were not comfortable with Dr. Tishler and would prefer that P.J. be treated by Dr. Simone. During the hearing, the Juvenile Court asked Dr. Albritton whether Dr. Simone could be the primary treating physician. Dr. Albritton answered:

> No, we wouldn't make him the primary oncologist. My understanding, in fact, is that he is not board certified in oncology, either pediatric or medical oncology. He's - from what little I know, he's a specialist in complimentary and alternative medicine. So the gist I get is that he would be asking someone either in Utah or L.A. to be prescribing the chemotherapy and then he would be suggesting the complimentary approaches that might diminish side effects and so on. I do not think there will be an oncologist in Utah or L.A. who would let him prescribe the chemotherapy from New Jersey.[13]

The Juvenile Court also asked Dr. Tishler whether P.J.'s primary treating physician needed to be a board certified oncologist. Dr. Tishler answered: "Definitely. There's no other physician that could lead the care and provide the care."[14] Based on this, the Juvenile Court ordered that P.J.'s primary treating physician be a board certified pediatric oncologist or

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[13]Docket No. 334, Ex. 33-C, 50-51.

[14]*Id.* at 53-54.

hematologist, but that Dr. Simone was authorized to work with P.J.'s other treating physicians. The Court also scheduled an evidentiary hearing on the Verified Petition for August 20, 2003, in the event P.J.'s situation was not yet resolved.

The Jensens never returned to CHLA or PCMC to receive the ordered chemotherapy for P.J. Instead, they sought evaluation at the Burzynski Clinic in Houston, Texas. Around August 6, 2003, the Jensens contacted the Burzynski Clinic to inquiry whether it could treat P.J. On August 7, 2003, an employee of the Burzynski Clinic called the Jensens to indicate that the Clinic was willing to see him. Accordingly, an appointment was set for August 12, 2003.

At this point, the Jensens apparently believed that they did not have to comply with the Juvenile Court's order to begin chemotherapy by August 8, 2003, and that this would only result in the Juvenile Court's holding the August 20, 2003 evidentiary hearing on the Verified Petition. Thus, on August 8, 2003, the Jensens took P.J. and the rest of their children to Bear Lake in Idaho to go boating. From Idaho, they planned to travel to Houston for P.J. to be evaluated at the Burzynski Clinic on August 12.

Having not received confirmation that P.J.'s chemotherapy was underway, Ms. Eisenman sought a hearing with the Juvenile Court on August 8, 2003, for the purpose of seeking authorization to take P.J. into protective custody. Ms. Eisenman called Mr. Nakamura to notify him of her intent to obtain a protective custody order. Present at the August 8, 2003 hearing were Ms. Eisenman, Ms. Cunningham, P.J.'s guardian ad litem, and Mr. Nakamura. Mr. Nakamura participated in the August 8 hearing by telephone. Mr. Nakamura indicated that P.J. was not receiving chemotherapy, that the Jensens did not want to initiate chemotherapy, and that they were taking P.J. to the Burzynski Clinic for evaluation. In response to the disclosure of the Jensens' intent to seek evaluation at the Burzynski Clinic, Ms. Cunningham paged Dr. Albritton,

who then participated in the hearing by telephone. The Juvenile Court and counsel asked Dr. Albritton whether the Burzynski Clinic was qualified to provide P.J.'s treatment. Dr. Albritton indicated that Dr. Burzynski was not a board certified oncologist-hematologist and that his clinic is known for providing extremely controversial therapy. Dr. Albritton further indicated that she was unaware of any pediatric oncologists at the Burzynski Clinic, but would need more time to confirm that fact. Finally, Dr. Albritton testified that the Burzynski Clinic was not an appropriate option for a newly-diagnosed cancer patient who had not exhausted standard treatment options.

Ms. Eisenman then filed an Application to Take a Child Into Protective Custody. This application was supported by an affidavit signed by Ms. Cunningham on August 8, 2003. Attached to Ms. Cunningham's affidavit was an affidavit executed by Dr. Wagner on July 22, 2003. The Juvenile Court signed an order authorizing DCFS to take P.J. into protective custody, finding that it was in P.J.'s best interest. Ms. Eisenman enlisted the help of Sandy City Police Officer Peterson, whom she had contacted earlier that day, to help serve the warrant. Officer Peterson was unable to serve the warrant because the Jensens had already left for Bear Lake earlier that day.

Mr. Nakamura informed the Jensens that the Juvenile Court had signed a "pickup order" and that P.J. was to be placed in DCFS custody to begin chemotherapy. Despite this, the Jensens decided to stay in Idaho and seek an independent opinion of P.J.'s condition in preparation for the evidentiary hearing scheduled for August 20, 2003.

On August 13, 2003, P.J.'s guardian ad litem filed a motion for an order to show cause. After hearing the motion that same day, the Juvenile Court entered a bench warrant for the Jensens' arrest and ordered them to appear and present P.J. However, a Juvenile Court clerk told

Ms. Eisenman and P.J.'s guardian ad litem that a Juvenile Court warrant would not be placed on a national database, which would require an adult warrant. Perhaps recognizing this, Ms. Eisenman announced to the Jensens' attorneys and P.J.'s guardian ad litem that if the Jensens did not cooperate with the Juvenile Court orders, she would have to go to local and federal law enforcement authorities.

Based on information provided by Ms. Eisenman to Officer Peterson, the Salt Lake County District Attorney's Office agreed to screen the Jensen matter for criminal charges on August 15, 2003. Ms. Eisenman, Ms. Cunningham, and P.J.'s guardian ad litem attended the August 15 screening. That same day, the District Attorney's Office filed criminal charges against the Jensens, including one count of custodial interference and one count of kidnaping.

On August 16, 2003, Mr. Jensen was arrested in Idaho where he spent four days in jail before he was released on bail. Upon Mr. Jensen's arrest, Ms. Jensen left Idaho and took P.J. to Houston in an attempt to meet with the Burzynski Clinic. However, the Burzynski Clinic refused to see P.J. because Ms. Eisenman and P.J.'s guardian ad litem informed the clinic that the State had been granted protective custody over P.J. and did not consent to his treatment.

The Juvenile Court held a non-evidentiary hearing on August 20, 2003. In that hearing, Mr. Nakamura read a letter written by Mr. Jensen and explained that the Jensens wished to have an opportunity to present evidence. The Juvenile Court agreed to set an evidentiary hearing, but refused to lift the warrants.

Shortly after this hearing, Ms. Eisenman assumed a new position in the Attorney General's Office and no longer participated in P.J.'s case. Additionally, Mr. Anderson, Director of DCFS, was asked by a representative of Utah's Governor to personally assist in negotiating a

resolution to P.J.'s case. Accordingly, on August 27, 2003, Mr. Anderson flew to Idaho to meet with the Jensens where negotiations continued for several days.

On September 5, 2003, the parties entered into a stipulation in which the Jensens agreed to submit P.J. to the care of Dr. Johnston—a board-certified pediatric oncologist—of St. Luke's Hospital in Boise, Idaho, and to abide by his treatment recommendations. DCFS agreed to ask the Juvenile Court to return full custody of P.J. to the Jensens and to vacate the warrants. After receiving assurances that the Jensens would submit to chemotherapy if Dr. Johnston recommended it, the Juvenile Court approved the stipulation.

After performing his evaluation, Dr. Johnston concluded that P.J. needed chemotherapy. The Jensens again refused to submit P.J. to chemotherapy, claiming that Dr. Johnston was merely rubber-stamping the diagnosis of the PCMC doctors. Mr. Jensen told Dr. Johnston that if P.J. ever did receive chemotherapy at St. Luke's, he would "make sure it's a hellish experience for everybody involved."[15]

Another hearing was held in the Juvenile Court on October 8, 2003. At the October 8 hearing, Dr. Johnston testified that he had confirmed P.J. had Ewing's Sarcoma and that the Jensens had rejected his recommendation that P.J. undergo chemotherapy. Assistant Attorney General Mark May, who replaced Ms. Eisenman on P.J.'s case, indicated that the parties would attempt to reach a settlement.

Having determined that the Jensens would not submit P.J. to chemotherapy under any circumstances, DCFS filed a Motion to Dismiss Verified Petition on October 22, 2003. In its Motion, DCFS stated that its decision to dismiss the Verified Petition was made with full

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[15]Docket No. 344, Ex. 11, at 700-01.

recognition that without chemotherapy P.J.'s chances of survival would fall dramatically. Nonetheless, DCFS concluded that it was simply unworkable to attempt to force a 13-year-old boy to undergo chemotherapy unwillingly.

On October 2, 2003, the Jensens entered a plea agreement with the State on the criminal charges. The Jensens agreed to enter a guilty plea and abeyance on the custodial interference charge in exchange for the State's promise to dismiss the kidnaping charge.

III. DISCUSSION

In July 2005, the Jensens filed a Complaint in the Third Judicial District Court for Salt Lake County, Utah, against the State of Utah, Intermountain Health Care, Inc., Ms. Cunningham, Mr. Anderson, Dr. Wagner, Dr. Corwin, Dr. Coffin, Dr. Albritton, and Ms. Eisenman. In their Complaint, the Jensens allege the following causes of action: (1) § 1983 - violation of the substantive due process right to direct medical care (2) § 1983 - violation of the substantive due process right to familial association;[16] (3) § 1983 - malicious prosecution under the Fourth

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[16]In their Complaint, the Jensens allege that Defendants violated their right to familial association under both the First Amendment and the Due Process Clause of the Fourteenth Amendment. However, in the Tenth Circuit "the familial right of association is properly based on the 'concept of liberty in the Fourteenth Amendment.'" *Griffen v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993). The Court recognizes that the Tenth Circuit has, in dictum, recognized a First Amendment right "to enter into and maintain certain intimate or private relationships." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 358 (10th Cir. 2006) (dealing with expressive association). Nonetheless, the Tenth Circuit has consistently analyzed familial association claims within the substantive due process framework, even in cases decided subsequent to the *Grace United Methodist Church* case. *See Estate of Herring v. City of Colorado Springs*, 233 Fed. Appx. 854, 856 (10th Cir. May 18, 2007) (recognizing that "the familial right of association is grounded in the Fourteenth Amendment concept of liberty") (unpublished decision); *Suasnavas v. Stover*, 196 Fed. Appx. 647, 654 (10th Cir. Aug. 25, 2006) ("The right of familial association is a substantive due process right . . . .") (unpublished decision); *Chatwin v. Barlow*, 2008 WL 501109, at *4 (D. Utah Feb. 20, 2008) ("The Tenth Circuit has recognized that the freedom of familial association is a substantive right guaranteed by the due process clause of the Fourteenth Amendment.") (unpublished decision). Based on the long line of cases employing the standards set forth in *Griffen*, the Court finds that the Jensens'

Amendment; (4) § 1983 - violation of the Ninth Amendment; (5) violation of article I, section 1 of the Utah Constitution; (6) violation of article I, section 7 of the Utah Constitution; (7) violation of article I, section 14 of the Utah Constitution; (8) violation of article I, section 25 of the Utah Constitution; (9) wrongful initiation; and (10) intentional infliction of emotional distress.

After removing the case to this Court, the Defendants filed motions to dismiss. In an Order dated June 16, 2006, the Court dismissed the State of Utah on the basis of sovereign immunity and Drs. Corwin and Coffin on the basis of absolute immunity. The Court also dismissed the fourth and eighth causes of action in their entirety and the first and third causes of action to the extent they were asserted by P.J. IHC has since been voluntarily dismissed.

After the close of discovery on the issue of liability, Mr. Anderson, Ms. Cunningham, Ms. Eisenman, Dr. Wagner, and Dr. Albritton filed the motions presently before the Court, arguing that they are entitled to summary judgment on Plaintiffs' federal claims based on the *Rooker-Feldman* Doctrine, absolute immunity, and qualified immunity.

A. The *Rooker-Feldman* Doctrine

"*Rooker-Feldman* precludes federal district courts from effectively exercising appellate jurisdiction over claims 'actually decided by a state court' and claims 'inextricably intertwined' with a prior state-court judgment."[17] The doctrine arises from 28 U.S.C. § 1257(a), which allows

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familial association claims arise from and are appropriately analyzed under Due Process Clause of the Fourteenth Amendment.

[17]*Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1237 (10th Cir. 2006) (quoting *Kenmen Eng'g v. City of Union*, 314 F.3d 468, 473 (10th Cir. 2002)) (internal quotation marks omitted).

review of state-court judgments by the United States Supreme Court and, by negative inference, precludes lower federal courts from exercising such jurisdiction.[18]

Noting that the doctrine had, at times, been applied by lower courts far beyond its original contours, the Supreme Court declared in the case of *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,[19] that application of the *Rooker-Feldman* doctrine is limited to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."[20] The Tenth Circuit summarized the *Exxon Mobil* holding as follows:

> As the Supreme Court emphasized in *Exxon Mobil*, the *Rooker-Feldman* doctrine does not apply "simply because a party attempts to litigate in federal court a matter previously litigated in state court." To the contrary, a party may lose in state court and then raise precisely the same legal issues in federal court, so long as the *relief sought* in the federal action would not reverse or undo the *relief granted* by the state court: "if a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . ., then there is jurisdiction . . . .'"[21]

Accordingly, *Rooker-Feldman* applies only where the relief sought in the federal case would "reverse or undo the state court judgment."[22]

Rooker-Feldman has been applied to constitutional claims arising from child custody proceedings in state courts. For example, in *Warnick v. Briggs*,[23] this Court applied the doctrine

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[18] *Id.*

[19] 544 U.S. 280 (2005).

[20] *Id.* at 284.

[21] *Mo's Express*, 441 F.3d at 1237 (quoting *Exxon Mobil*, 544 U.S. at 292-94).

[22] *Id.*

[23] 2007 WL 3231609 (D. Utah Oct. 30, 2007).

to a § 1983 claim alleging various constitutional violations against several state actors, seeking review of the circumstances surrounding the removal of the plaintiff's child by the state without a pre-removal hearing.[24] The Court found that "if it adjudicated Plaintiffs' claims relating to [the child's] removal, [it] would effectively act as an appellate court in reviewing the juvenile court's disposition."[25] Applying *Rooker-Feldman* in that situation made sense as the juvenile court heard and decided the issue of whether the circumstances justified the child's removal, and the plaintiff did not challenge the "integrity of the evidence" before the juvenile court.[26]

However, where a plaintiff's federal cause of action is for injury sustained as a result of actions taken during the course of the custody proceedings that are separate from the judgments of the state court, *Rooker-Feldman* does not apply. The case of *Brokaw v. Weaver*[27] of the Seventh Circuit is particularly persuasive on this point and is closely analogous to the Jensens' case. In *Brokaw*, the plaintiff was removed from her parents and placed in state custody by order of a state court after a social worker and others fabricated a charge of child neglect.[28] Subsequently, another state court found no continuing basis to hold the plaintiff in state custody and released her to her parents.[29] Years later, after reaching the age of majority, the plaintiff brought suit in federal court against the social worker and the others who made up the neglect

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[24] *Id.* at *9-10.

[25] *Id.* at *10.

[26] *Id.*

[27] 305 F.3d 660 (7th Cir. 2002).

[28] *Id.* at 662.

[29] *Id.* at 663.

charges, alleging violations of her right to familial relations under substantive due process, violation of the Fourth Amendment in her removal, and violation of procedural due process.[30] The district court dismissed the case based on application of the *Rooker-Feldman* doctrine.

The Seventh Circuit reversed, finding that the actions of the defendants "violated her constitutional rights, independently of the state court decision."[31] The court recognized that the plaintiff's injuries would not have happened without the state court's order directing her removal and placing her in state custody. Nonetheless, the court found that the plaintiff's claims were independent of the state court judgments, emphasizing that even if the plaintiff "would not have suffered any damages absent the state order . . . her claim for damages [was] based on an alleged independent violation of her constitutional rights. It was this separate constitutional violation which caused the adverse state court decision."[32] Thus, the true cause of the plaintiff's injuries was the defendant's actions, even though the injuries would not have occurred absent the state court's order.[33]

In this case, the Court finds that the *Rooker-Feldman* doctrine does not apply to the Jensens' claims, as they seek relief independent from any judgements rendered by the state courts. The Jensens do not seek to reverse or undo any judgments of the state courts. After all, the Verified Petition was ultimately dismissed and full custody of P.J. returned to the Jensens.

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[30]*Id.*

[31]*Id.* at 665.

[32]*Id.* at 667; *see also Holloway v. Borsh*, 220 F.3d 767, 778-79 (6th Cir. 2000) (finding § 1983 suit against caseworker independent of state custody proceedings based on actions taken by the caseworker during the course of the state proceedings).

[33]*Brokaw*, 305 F.3d at 667.

Rather, the Jensens' claims are based on the separate conduct of the Defendants previous to and during the course of the proceedings in the state courts. Although the Juvenile Court was surely called upon to balance the parental rights of the Jensens with the State's interest in protecting P.J.'s welfare, nothing in the record indicates that either the Juvenile Court or the state criminal court heard and ruled on claims that the Defendants deliberately misrepresented and omitted material facts to the state courts, to each other, to the District Attorney's Office, or others involved in the events surrounding P.J.'s medical care in 2003.

Thus, the Jensens allege independent claims similar to those in the *Brokaw* case. Although much of the injury alleged by the Jensens would not have resulted in the absence of the Juvenile Court's orders, the Jensens argue that the underlying cause of those orders was the Defendants' factual misrepresentations and omissions. The Jensens' claims are different from those in the *Warnick* case, where the state court entered specific findings of fact on the very events complained of by the plaintiffs and where there was no challenge to the integrity of the evidence. It is true that granting relief to the Jensens in this case might require the Court to enter findings that contradict issues decided by the state court. However, this does not, of itself, invoke the *Rooker-Feldman* doctrine.[34] Thus, the constitutional injury alleged by the Jensens is separate and independent from any orders of the state courts, precluding application of the *Rooker-Feldman* doctrine.

It must be noted, however, that the Jensens' claims are properly before this Court only to the extent that they allege the Defendants engaged in conduct that was not brought before the Juvenile Court or conduct that materially affected the integrity of the evidence on which the

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[34]*Mo's Express*, 441 F.3d at 1237.

Juvenile Court relied. It is not for this Court to decide whether P.J. actually had Ewing's Sarcoma or whether the Juvenile Court properly balanced the State's interest in protecting children and the Jensens' constitutional rights. Those issues, and other similar matters, were squarely ruled on by the Juvenile Court and could only be properly challenged by the Jensens through an appeal.

B. Absolute Immunity

"The Supreme Court has recognized the defense of absolute immunity from civil rights suits in several well-established contexts involving the judicial process."[35] "[S]tate attorneys and agency officials who perform functions analogous to those of a prosecutor in initiating and pursuing civil and administrative enforcement proceedings are absolutely immune from suit under section 1983 concerning activities intimately associated with the judicial . . . process."[36] The Tenth Circuit has recognized that social workers are entitled to absolute immunity when they meet this criteria.[37]

The Court applies a "functional approach" to determine whether activities are sufficiently connected with the judicial process to merit absolute immunity.[38] A prosecutor is entitled to absolute prosecutorial immunity "when performing the traditional functions of an advocate."[39] Thus, a prosecutor enjoys absolute immunity even when he or she is accused of making

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[35]*Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir. 1990).

[36]*Scott v. Hern*, 216 F.3d 897, 908 (10th Cir. 2000) (quoting *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir. 1990)) (internal quotation marks omitted).

[37]*Snell*, 920 F.2d at 687-91 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)).

[38]*Id.* at 686.

[39]*Kalina v. Fletcher*, 522 U.S. 118, 131 (1997).

misrepresentations to the court, as long as the actions were taken in the role of an advocate.[40] "However, absolute immunity does not extend to actions 'that are primarily investigative or administrative in nature,' though it 'may attach even to such administrative or investigative activities when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court.'"[41]

As a general rule, witnesses who testify in a judicial proceeding, whether during trial or before, are likewise entitled to absolute immunity from suit arising from their testimony.[42] However, absolute witness immunity is not available to "complaining witnesses"—"the person (or persons) who actively instigated or encouraged the prosecution of the plaintiff"—for testimony "that is relevant to the manner in which the complaining witness initiated or perpetuated the prosecution."[43]

As explained below, the Court finds that Ms. Eisenman and Dr. Albritton are absolutely immune from all of the Jensens' § 1983 claims. Ms. Cunningham is likewise entitled to absolute immunity with regard to her decision to file the Verified Petition, but is not so entitled with regard to the rest of the conduct alleged in the Jensens' Complaint.

Ms. Eisenman. Ms. Eisenman argues that she is absolutely immune from the Jensens' claims arising from functions performed in her role as an advocate or in fulfillment of her duties as an officer of the Juvenile Court. The Jensens claim that Ms. Eisenman engaged in a number

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[40] *Imbler*, 424 U.S. at 430-31 & n.34.

[41] *Scott*, 216 F.3d at 908 (quoting *Pfeiffer*, 929 F.2d at 1490) (internal quotation marks omitted).

[42] *Anthony v. Baker*, 955 F.2d 1395, 1400 (10th Cir. 1992).

[43] *Id.* at 1399 n.2, 1402.

of harmful activities outside the scope of her advocate role, which are grouped as follows for purposes of analysis: (1) factual misrepresentations and omissions made to the Juvenile Court; (2) misrepresentations to Ms. Cunningham, Mr. Anderson, and Utah Attorney General Shurtleff;[44] (3) factual misrepresentations and omissions made to the District Attorney's Office; and (4) other investigative activities. Additionally, although not discussed by the Jensens, Ms. Eisenman contends that she is immune from claims arising from the August 2003 letter to the Burzynski Clinic in which Ms. Eisenman informed the Clinic of the custody order and forbade the clinic from providing any treatment to P.J. The Court finds that Ms. Eisenman is entitled to absolute immunity with respect to all of the Jensens § 1983 claims.

Ms. Eisenman is absolutely immune with regard to the first group—misrepresentations made to the Juvenile Court. Even assuming that Ms. Eisenman intentionally misrepresented facts to the Juvenile Court, those misrepresentations were made in her role as an advocate. There is no evidence that any of the alleged misrepresentations were made under oath or as a witness.

The Court likewise finds that Ms. Eisenman is entitled to absolute immunity with regard to the second group—misrepresentations to others involved in the Juvenile Court proceedings. Ms. Eisenman's communications with these persons were all directly related to the Juvenile Court proceedings. Ms. Cunningham and Mr. Anderson from DCFS were Ms. Eisenman's clients. Attorney General Shurtleff was Ms. Eisenman's co-prosecutor, whose name was on the Juvenile Court pleadings. The parties have not cited, nor has additional research uncovered, any cases dealing with the question of whether a prosecutor is entitled to absolute immunity for communications with her clients and co-counsel. Nonetheless, these communications are

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[44]The Jensens also claim that a misrepresentation was made to the Guardian ad Litem, but offer no citation to evidence that would support this assertion.

directly related to a prosecutor's ability to present the State's case, satisfying the guiding principle of prosecutorial immunity—proximity to the "judicial process and the initiation and presentation of the state's case."[45] A prosecutor must be able to freely speak with her client—the very person for whom he is advocating—and the other prosecutors assigned to the case without fear that their communications may later form the basis of a civil suit. These communications likely include discussions of, among other things, trial preparation and strategy, discussion of applicable law, as well as plea and settlement opportunities. Allowing claims to proceed against a prosecutor based on information shared (or not shared) during the course of discussions with his client and/or his fellow prosecutor would interfere with the prosecutor's ability to present the State's case.[46] Thus, the public policy behind the prosecutorial privilege—"to allow functionaries in the judicial system the latitude to perform their tasks absent the threat of retaliatory litigation"[47]—fully supports Ms. Eisenman's entitlement to absolute immunity with regard to her communications with Ms. Cunningham, Mr. Anderson, and Attorney General Shurtleff.

The Court also finds that Ms. Eisenman is entitled to absolute immunity with regard to the third category—misrepresentations made to the District Attorney. The Jensens have submitted sufficient evidence to show that Ms. Eisenman provided the District Attorney's Office with factual information that led to the criminal charges against the Jensens. In the absence of other considerations, this would render Ms. Eisenman a complaining witness, absolving her of

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[45] *Scott*, 216 F.3d at 908.

[46] *Id.*

[47] *Snell*, 920 F.2d at 686-87.

prosecutorial immunity with regard to the criminal case.[48] However, the Juvenile Court had ordered that DCFS take protective custody of P.J. Despite being apprised by their attorney of the Juvenile Court's custody order, the Jensens refused to return to Utah and produce P.J. Seeking to effectuate the Juvenile Court's order, Ms. Eisenman provided information to the District Attorney's office which led to the initiation of criminal charges. It is clear to this Court that these actions were intimately connected with her duties to the Juvenile Court.[49] For these same reasons, Ms. Eisenman's actions in drafting and sending the August 2003 letter to the Burzynski Clinic were also intimately connected with the Juvenile Court proceedings. Accordingly, the Court finds that Ms. Eisenman is entitled to absolute immunity with respect to the Jensens' claims related to her providing allegedly misleading information to the District Attorney's Office and to her drafting and sending the August 2003 letter to the Burzynski Clinic.

With regard to the fourth grouping—investigative activities—the Jensens point to two examples of investigative activities engaged in by Ms. Eisenman: (1) providing documents to Dr. Albritton in advance of a July 10, 2003 hearing; and (2) sending an email to Dr. Birkmayer in which she made false representations regarding the standard of care for Ewing's Sarcoma treatment. Concerning the former, the Jensens do not show how providing documents to a witness in the course of preparing for a hearing is investigative. With respect to the latter, the Jensens offer the following evidence in support of their assertion that Ms. Eisenman discovered the standard mentioned in the email to Dr. Birkmayer through her own investigative efforts: (1)

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[48] *Kalina*, 522 U.S. at 129-31.

[49] *Cf. Burrows v. Cherokee County Sheriff's Office*, 38 Fed. Appx. 504, 506 (10th Cir. Mar. 19, 2002) (granting immunity to prosecutor for his actions in seeking extradition order) (unpublished decision).

Ms. Eisenman testified that she could not remember where she got the document containing the referenced standard; (2) that Dr. Wagner testified that he did not give it to her; and (3) that P.J.'s guardian ad litem did not recognize the document. Even when viewed in the light most favorable to the Jensens, this testimony does not permit an inference that Ms. Eisenman obtained the document through her own investigative efforts. A number of doctors participated in DCFS's involvement with P.J.'s situation—including Drs. Lemons and Albritton, both pediatric oncologists—any one of whom might have provided this information to Ms. Eisenman. Therefore, the Court concludes that Ms. Eisenman is absolutely immune from these claims, which are directly related to Ms. Eisenman's efforts to marshal the evidence and prepare for witness examination.

Dr. Albritton. The Jensens' claims against Dr. Albritton are based on the following allegations: (1) that Dr. Albritton stated to Ms. Eisenman, Ms. McDonald, and the Juvenile Court that only a board-certified pediatric oncologist was qualified to treat P.J.; (2) that Dr. Albritton misrepresented the qualifications and services of the Burzynski Clinic to the Juvenile Court; and (3) that Dr. Albritton failed to disclose to the Juvenile Court and others that genetic testing was routinely conducted at PCMC on cases of suspected Ewing's Sarcoma.[50] Each of these allegations are directly tied to Dr. Albritton's role as an expert witness in which she opined as to the medical care required by P.J. and what doctors and facilities were capable of providing it.

[50]In opposing absolute immunity, the Jensens also point to circumstantial evidence that they claims shows Dr. Albritton provided false information to Dr. Johnston. The Jensens argue that this makes Dr. Albritton a complaining witness. However, nowhere in their briefs do the Jensens rely on this evidence to support their constitutional claims. The Jensens make no effort to show how Dr. Albritton's alleged conversation with Dr. Johnston violated their constitutional rights.

This was precisely what Dr. Albritton was subpoenaed to testify about. Accordingly, the Court finds that Dr. Albritton is entitled to absolute immunity from the Jensens' § 1983 claims.

Ms. Cunningham. The Jensens base their § 1983 claims against Ms. Cunningham on her failure to investigate P.J.'s referral before filing the Verified Petition and on the factual misrepresentations she allegedly made to the Juvenile Court. Ms. Cunningham contends that she is absolutely immune from each of the claims asserted by the Jensens because she performed only prosecutorial functions.

The Court finds that Ms. Cunningham is entitled to absolute immunity, but only with regard to her decision to file the Verified Petition. The Verified Petition was filed with an accompanying "Verification" in which Ms. Cunningham swore under oath that the "matters stated [in the Petition] are true."[51] Although Ms. Cunningham surely exercised prosecutorial discretion in electing to file the petition, she acted outside the scope of any prosecutorial function by attesting under oath to the allegations in the Verified Petition as a complaining witness.[52] Thus, although Ms. Cunningham is entitled to absolute immunity for her decision to file the Verified Petition, she is not immune from the Jensens' claims based their contention that the Verified Petition contained misrepresentations and omissions. For the same reasons, Ms. Cunningham is not immune from the Jensen's claims arising from the submission of her August 2003 affidavits, which the Jensens claim contained factual misrepresentations and omissions.

Finally, Ms. Cunningham is not absolutely immune from the Jensens' claims arising from her alleged failure to properly investigate P.J.'s referral because this duty did not sufficiently

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[51]Verified Petition, Docket No. 345, Ex. 43, at 6.

[52]*Kalina*, 522 U.S. at 129-31.

relate to the judicial proceedings. Certainly, prosecutorial immunity may be had for actions in "obtaining, reviewing and evaluating evidence" prior to initiation of a criminal action.[53] However, this is because these investigative actions "are necessary so that a prosecutor may fulfill his function as an officer of the court."[54] Although a judicial proceeding might result from its fulfillment, Ms. Cunningham's duty to investigate reports of child neglect is for the purpose of protecting the children who are the subject of those reports.[55] Therefore, it cannot be said that fulfillment of this duty is intimately associated with the judicial process. Accordingly, the Court will deny Ms. Cunningham's request for summary judgment based on absolute immunity.

C. Qualified Immunity

Each of the Defendants also asserts qualified immunity with respect to the Jensens' § 1983 claims. Where a state actor raises a qualified immunity defense in a motion for summary judgment, "the burden shifts to the plaintiff to satisfy a strict two-part test: first, the plaintiff must show that the defendant's actions violated a constitutional or statutory right; second, the plaintiff must show that this right was clearly established at the time of the conduct at issue."[56] "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law."[57]

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[53]*Snell*, 920 F.2d at 693.

[54]*Id.*

[55]Utah Code Ann. § 62A-4a-409.

[56]*Clark v. Edmunds*, 513 F.3d 1219, 1222 (10th Cir. 2008) (quoting *Nelson v. McMullen*, 207 F.3d 1202, 1205 (10th Cir. 2000).

[57]*Id.*

A right is clearly established where "it would be clear to a reasonable officer that his conduct was unlawful in the situation."[58] This determination must be made "in light of the specific context of the case, not as a broad general proposition."[59] That a right was clearly established can be shown by controlling case law in the Tenth Circuit or by the weight of authority in other circuits.[60] Notably, though, the Supreme Court has held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[61]

In their § 1983 claims, the Jensens allege that Defendants violated their substantive due process rights and their rights to be free from unreasonable searches and seizures.

1. Substantive Due Process

In their first and second causes of action, the Jensens[62] claim that each of the Defendants engaged in substantive due process violations of the Jensens' rights to familial association and to direct P.J.'s medical care.

The Fourteenth Amendment provides that a state may not "deprive any person of life, liberty, or property, without due process of law."[63] In addition to procedural protections, the Due Process Clause also provides two forms of "substantive" protection: (1) protection against

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[58]*Cortez v. McCauley*, 478 F.3d 1108, 1114 (10th Cir. 2007) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

[59]*Id.* (quoting *Katz*, 533 U.S. at 201).

[60]*Id.* at 1114-15.

[61]*Id.* at 1115 (quoting *Hope v. Peizer*, 536 U.S. 730, 741 (2002)).

[62]In its June 2006 Order, the Court dismissed P.J.'s claims for violation of his right to refuse unwanted treatment. Thus, P.J. proceeds only on his familial association claim.

[63]U.S. Const. Amend. XIV § 1.

government action that "shocks the conscience" and (2) protection of fundamental liberty interests.[64] In the case of *Seegmiller v. Laverkin City*, the Tenth Circuit recently clarified that these two "strands of the substantive due process doctrine" are not mutually exclusive.[65] Rather, "by satisfying either the 'fundamental right' or the 'shocks the conscience' standards, a plaintiff states a valid substantive due process claim."[66] The *Seegmiller* court admonished: "Courts should not unilaterally choose to consider only one or the other of the two strands. Both approaches may well be applied in any given case."[67]

A substantive due process claim based on arbitrary and oppressive government action is established where the conduct in question is so egregious that it "shocks the conscience of federal judges."[68] Mere negligence is clearly insufficient to meet this standard.[69] For that matter, even an intentional or reckless abuse of power that causes the plaintiff injury does not, of itself, meet the "shocks the conscience" standard.[70] Rather, there must be "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking."[71]

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[64] *Seegmiller v. Laverkin City*, 528 F.3d 762, 767 (10th Cir. 2008).

[65] *Id.* at 767, 769.

[66] *Id.* at 767.

[67] *Id.* at 769.

[68] *Ward v. Anderson*, 494 F.3d 929, 938 (10th Cir. 2007) (quoting *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006)) (internal quotations marks omitted).

[69] *Id.* at 937.

[70] *Id.* at 937-38.

[71] *Id.* at 938.

A substantive due process plaintiff asserting a fundamental liberty interest must narrowly articulate its scope.[72] The Court must then determine whether the asserted interest is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[73] Should both of these hurdles be cleared, the plaintiff must then show that the government actor's conduct infringed on the plaintiff's fundamental liberty interest and was "not narrowly tailored to serve a compelling state interest."[74]

The Jensens claim that Defendants infringed on their right to direct P.J.'s medical care and their right to familial association. The Supreme Court has recognized that the Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[75] This "fundamental right" encompasses both of the liberty interests asserted by the Jensens, calling for application of the compelling interest/narrowly tailored standard. In *Dubbs v. Head Start, Inc.*,[76] the Tenth Circuit reversed a district court for applying the "shocks the conscience" standard to the substantive due process claims of two parents against the state for infringing on their right to direct the medical care of their children.[77]

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[72]*Seegmiller*, 528 F.3d at 769 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

[73]*Id.* (quoting *Chavez v. Martinez*, 538 U.S. 760, 775-76 (2003)) (internal quotation marks omitted).

[74]*Seegmiller*, 528 F.3d at 767.

[75]*Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion).

[76]336 F.3d 1194 (10th Cir. 2003).

[77]*Id.* at 1202-03.

Although it ultimately declined to delineate the applicable standard due to the scant record before it, the court included a parent's right to direct the medical care of his or her children among those fundamental rights for which a substantive due process claim may be stated without meeting the "shocks the conscience" standard.[78]

Dr. Wagner contends that the Jensens have not narrowly articulated their right to direct P.J.'s medical care and, therefore, are not entitled to application of the compelling interest/narrowly tailored standard. More specifically, Dr. Wagner argues that the Jensens' claim to absolute autonomy in directing the medical care decisions of their son conflicts with the "'Constitution's notions of ordered liberty,' which have always protected a child's right to treatment whenever it has been unreasonably denied by a parent."[79] The Court agrees with this general proposition. However, with a few notable exceptions that are discussed below, the Court does not read the Jensens' claimed right so broadly. The Jensens do not claim a right to direct P.J.'s medical care free of *any* State interference. Rather, they claim that the State cannot interfere with their right to direct P.J.'s medical care by making deliberate and material factual misrepresentations and omissions to state courts and other decision makers during the process by which that interference is accomplished. As the Court recognized in its June 2006 Order, when the Jensens' right to direct P.J.'s medical care is placed in this context, it is not only fundamental, but is also clearly established.[80]

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[78]*Id.*

[79]Docket No. 381, at 2.

[80]Docket No. 52, at 22, 34, 41 (citing *Pierce v. Gilchrist*, 359 F.3d 1279, 1297-99 (10th Cir. 2004); *Dubbs*, 336 F.3d at 1202-03).

The proper standard for claims of familial association is more complicated. As a fundamental liberty interest,[81] the right to familial association between a parent and his or her child would logically be governed by the same standard applicable to other fundamental rights. However, the Tenth Circuit has consistently applied a balancing test to claims for infringement of the familial association right.[82] In *Griffen v. Strong,* the Tenth Circuit called for a balancing test to determine whether a state actor's conduct "constituted an undue burden" on a plaintiff's right to familial association.[83] A court applying the undue burden test should balance the plaintiff's right to familial association against the relevant interests of the state, considering the "severity of the alleged infringement, the need for the defendant's conduct, and any possible alternatives."[84] This standard clearly involves lower scrutiny than the compelling interest/narrowly tailored test applicable to other fundamental rights. Indeed, the *Griffen* test requires the plaintiff to show that the state actor directed his conduct at the familial relationship "with knowledge that the . . . conduct will adversely affect that relationship."[85]

In its June 2006 Order, the Court opted to apply the *Griffen* standard as it remains good law in the Tenth Circuit, but noted the conflict between the compelling interest/narrowly tailored

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[81] *Gomes v. Wood*, 451 F.3d 1122, 1127 (10th Cir. 2006) (reciting parents' fundamental right to "care, custody and control of their children" in removal context).

[82] *See, e.g., Griffen v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993) (applying "undue burden" balancing test to substantive due process claim based on right of familial association between husband and wife); *Suasnavas v. Stover*, 196 Fed. Appx. 647, 656 (10th Cir. 2006) (applying *Griffen* undue burden test) (unpublished decision).

[83] *Griffen*, 983 F.2d at 1547.

[84] *Id.* at 1548.

[85] *Id.*

and undue burden standards. As the *Seegmiller* decision had no occasion to specifically consider the right to familial association in the child-welfare context or the long line of Tenth Circuit cases applying the undue burden test, the Court will continue to apply the *Griffen* standard to the Jensens' familial association claims.

Clearly, "the right to associate with one's family is a very substantial right."[86] However, this right "has never been deemed absolute or unqualified."[87] It is clear that the state may interfere with the right to familial association, even without prior notice and an opportunity to be heard, where such action is needed to ensure the safety of a child.[88] Thus, the Court must weigh the State's interest in protecting children against the Jensens' interest in familial association, given the factual record presented, to determine whether the State's interference constituted an undue burden on the Jensens' right to familial association.

With this framework in mind, the Jensens' substantive due process claims against Dr. Wagner, Ms. Cunningham, and Mr. Anderson are considered below.[89]

Dr. Wagner. The Jensens claim that Dr. Wagner violated their substantive due process rights based on the following allegations: (1) Dr. Wagner refused to perform genetic and molecular testing despite the Jensens' requests; (2) Dr. Wagner made this decision because of his desire to enroll P.J. in a clinical trial, which he did not disclose to the Jensens; (3) Dr. Wagner discouraged the Jensens from seeking a second opinion and then attempted to influence that

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[86]*Id.*

[87]*Martinez v. Mafchir*, 35 F.3d 1486, 1490 (10th Cir. 1994).

[88]*Gomes*, 451 F.3d at 1128-29.

[89]As discussed above, Ms. Eisenman and Dr. Albritton are entitled to absolute immunity on all of the Jensens' § 1983 claims.

opinion; (4) Dr. Wagner did not inform Dr. Lemons, Dr. Albritton, Dr. Coffin, Dr. Lowichik, Dr. Corwin, Ms. Cunningham, Ms. Eisenman, or the Juvenile Court of his refusal to order genetic and/or molecular testing; and (5) Dr. Wagner told Ms. Cunningham that P.J. could be dead in five days in order to persuade her to skip the normal investigative process.

Having closely examined the record, the Court finds the Jensens have not established that Dr. Wagner violated their substantive due process rights. It is undisputed that Drs. Lowichik and Coffin diagnosed P.J. with Ewing's Sarcoma after performing immunohistochemical testing. According to Dr. Coffin, this diagnosis was rendered with near certainty. Dr. Lowichik estimated her level of certainty "in the high 90 percent."[90] Dr. Coffin told Dr. Wagner that she was confident in the diagnosis and that no further testing was needed. This, according to Dr. Wagner, coupled with the need for immediate treatment, was the reason he did not order additional testing. When the Jensens would not agree to begin treatment that he believed was necessary to save P.J.'s life, Dr. Wagner referred P.J.'s case to DCFS. The Jensens offer no competent evidence to place these facts in dispute. Rather, the Jensens ask the Court to draw a number of unreasonable inferences, which the record plainly will not support, in order to attribute a more dubious purpose to Dr. Wagner's actions.

First, the Jensens point to the fact that Dr. Wagner was an administrator of a clinical trial for which P.J. might have been eligible, arguing that this was the reason behind Dr. Wagner's refusal to order more testing and his insisting on immediate chemotherapy treatment. Even assuming that it was inappropriate to refuse further testing and that Dr. Wagner did refuse the testing with the study in mind, the Jensens were free, at that point, to take P.J. to another facility

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[90]Docket No. 345, Ex. 16, at 31.

and another doctor for further testing. Thus, Dr. Wagner's refusal to order further testing did not, of itself, violate the Jensens' right to direct P.J.'s medical care free from unreasonable state interference.

Moreover, outside of P.J.'s possible eligibility to participate in the trial, the Jensens have produced no evidence that Dr. Wagner's decisions were motivated based on a desire to enroll P.J. in the trial. Indeed, the record would not permit such an inference. It is undisputed that the trial required enrollment within 30 days of the diagnostic biopsy—which, in P.J.'s case, occurred on May 2, 2003. Thus, on June 2, 2003, P.J. was no longer eligible to participate in the trial. If Dr. Wagner's refusal to order the tests and his push to immediately begin chemotherapy were motivated by a desire to enroll P.J. in the clinical trail, surely his efforts would have ceased or changed course after June 2, 2003. However, it is undisputed that Dr. Wagner's efforts to ensure that P.J. received chemotherapy continued after this date. It was not until after June 2, 2003, that Dr. Wagner involved Dr. Corwin. At the June 9, 2003 meeting at PCMC, Dr. Wagner again emphasized the need for P.J.'s chemotherapy to begin immediately before the cancer spread throughout his body. Finally, it was not until June 16, 2003, that Dr. Wagner referred P.J.'s case to DCFS. In light of these undisputed facts, it is entirely unreasonable to infer that Dr. Wagner's motivation for not ordering further testing and seeking immediate treatment was to enroll P.J. in the clinical trial.

The Jensens next contend that Dr. Wagner discouraged them from seeking a second opinion and then attempted to interfere with that opinion. In support of this claim, the Jensens testified that Dr. Wagner told them that insurance companies would often not pay for a second opinion, which would require the Jensens to pay for it. The Jensens also cite an email sent by Dr. Wagner to the oncologist who was to perform the second opinion, in which he stated,

Dear Dr. Grier,

> I am a pediatric oncologist sat [sic] the University of Utah, and I was wondering if you could provide consultation for a patient being followed in our clinic. This 12-year-old boy underwent excision of a dome-shaped lesion at the floor of the mouth. After careful review by Cheryl Coffin and other pathologists here in Salt Lake, the diagnosis of Ewing's sarcoma has been made. Supporting this diagnosis are the presence of small round blue cells which stain for O13, FLI-1, and vimentin. There is a weak positivity of S-100. Desmin and actin are negative, as are epithelial markers, CD3, and CD45. There was no fresh or frozen tissue to send for RT-PCR for Ewing's translocations, although this possibly could be done on archival paraffin-embedded tissue. If there is significant diagnostic uncertainty, additional fresh tissue could likely be obtained by re-excision, as the margins were clearly positive.
>
> I have discussed these results with the family, and expressed my confidence in the thorough histologic work-up that has been done by expert personnel. However, the family is interested in pursuing a second opinion, and has requested that we sed [sic] the tslides [sic] and tissue block to you for further review. I have explained that you are an oncologist and not a pathologist, etc., and that further consultations will delay the start of therapy (the child is now 19 days post-resection, as the tissue was initially sent to a pathologist in Washington who made a diagnosis of "poorly differentiated malignancy" after performing a limited immunihistovemocal [sic] work-up). Nevertheless, at their request, I am sending by FedEX the tissue to your institution addressed to you. I would greatly appreciate your help in expediting pathologic review so we can commence with treatment for this young man.[91]

This evidence does not rise to the level of a unconstitutional infringement of the Jensens' right to direct P.J.'s medical care. Whatever his motivations, the Jensens have offered no evidence that Dr. Wagner's statement regarding the likelihood of insurance coverage was false. Although Dr. Wagner clearly expressed confidence in the Ewing's Sarcoma diagnosis, along with his desire to quickly begin treatment, the above email does not support a reasonable inference that Dr. Wagner attempted to interfere with the second opinion sought by the Jensens.

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[91]Docket No. 345, Ex. 41, at LMW 8.

Finally, and most important to their substantive due process claims, the Jensens claim that Dr. Wagner did not tell others involved in P.J.'s case—including Ms. Cunningham, Ms. Eisenman, and the Juvenile Court—of his refusal to order further diagnostic tests despite the Jensens' requests and that he falsely told Ms. Cunningham that P.J. would be dead within five days. With respect to the former, even assuming that Dr. Wagner did in fact fail to tell others about his refusal to order the genetic and/or molecular tests, there is no evidence that he did so deliberately. Rather, as outlined above, the record demonstrates that Dr. Wagner believed that those tests were unnecessary and would delay needed treatment based on the diagnosis of Drs. Coffin and Lowichik. To the extent the Jensens claim substantive due process rights that would impose liability on Dr. Wagner for failing to disclose seemingly irrelevant facts, such rights are not implicit in the concept of ordered liberty and, therefore, do not merit protection under the compelling interest/narrowly tailored standard.

With respect to the latter, it is undisputed that Dr. Wagner communicated the emergency nature of P.J.'s medical situation to DCFS. The Jensens have not provided any evidence that Dr. Wagner did not actually believe this to be true. Instead, they contend that Dr. Wagner convinced Ms. Cunningham to forgo normal investigatory procedures by overstating the immediacy of P.J.'s medical needs, telling her that P.J. would be dead within five days. The Jensens base this assertion entirely on Mr. Anderson's deposition testimony. However, Mr. Anderson did not testify that Dr. Wagner made this statement, but that *someone* told Ms. Cunningham that P.J. would die within five days. Although Mr. Anderson agreed that it was likely the referring doctors, he "never verified who . . . made the statement."[92] More important, Mr. Anderson's

[92]Docket No. 345, Ex. 2, at 321.

testimony on this point is inadmissible hearsay and, therefore, must be disregarded.[93] Accordingly, the record merely shows that Dr. Wagner communicated his belief to Ms. Cunningham that P.J. required immediate medical treatment to give him the best chance possible of surviving Ewing's Sarcoma, as diagnosed by the pathologists at PCMC.

In summary, the Jensens ask the Court to find that Dr. Wagner violated their substantive due process rights to familial association and to direct P.J.'s medical care based on unreasonable inferences that stretch the record far beyond its actual content. This does not satisfy their burden of establishing a violation of their constitutional rights.

The Court finds that Dr. Wagner's conduct in providing medical care for P.J. and referring his case to DCFS after the Jensens would not consent to P.J.'s treatment were narrowly tailored to serve the State's compelling interest in protecting children. The record demonstrates that Dr. Wagner referred P.J.'s case to DCFS after the Jensens refused to consent to chemotherapy treatment which Dr. Wagner reasonably believed was necessary to save P.J.'s life. There were, perhaps, additional measures that Dr. Wagner could have taken that *might* have avoided the need to involve DCFS. For example, he might have ordered the additional tests despite his belief that they were unnecessary and would delay needed treatment. However, the constitution does not place an affirmative duty on him to do so where he reasonably believed P.J.'s life was in danger. To the extent the Jensens claim to the contrary, their substantive due process rights are no longer within the boundaries of fundamental rights and, therefore, are only entitled to protection under the shocks the conscience standard—which Dr. Wagner's conduct does not do.

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[93] *Argo v. Blue Cross and Blue Shield, Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006).

In reaching this conclusion, the Court finds it important that any actual interference with the Jensens' substantive due process rights was accomplished by referring the case to DCFS, filing the Verified Petition, and presenting P.J.'s case to a neutral judge—not by simply removing P.J. from his parents and forcing him to undergo chemotherapy. Indeed, the Jensens received ample opportunities to present their side of the story to the Juvenile Court. They were represented by counsel throughout the Juvenile Court proceedings. The Jensens correctly contend that the Constitution would not permit interference with their substantive due process rights by means of intentional misrepresentations to the Juvenile Court. However, as outlined above, the Jensens have simply not submitted evidence from which the Court can conclude that Dr. Wagner deliberately misrepresented the events and circumstances surrounding P.J.'s medical care to either the Juvenile Court or others involved in P.J.'s case.

For these same reasons, the Court finds that Dr. Wagner's conduct did not unduly burden the familial association rights of the Jensens and P.J. Dr. Wagner's decision to refer P.J. to DCFS minimally infringed the Jensens' familial association rights, preserving ample opportunity for the Jensens to present their interests to the Juvenile Court. Perhaps further discussion might have led to a more amiable solution, but in light of the perceived need for immediate treatment, it was entirely reasonable to submit P.J.'s medical situation to DCFS authorities. Again, the Jensens are correct that intentional and material factual misrepresentations and omissions on the part of Dr. Wagner to either DCFS representatives or the Juvenile Court would surely have interfered with their associational rights on a much grander scale. However, the record simply does not sustain these allegations. Accordingly, the Court will grant Dr. Wagner's Motion for Summary Judgment with respect to the Jensens' substantive due process claims.

Ms. Cunningham. The Jensens claim that Ms. Cunningham violated their substantive due process rights in two ways: (1) by failing to properly investigate P.J.'s referral; and (2) by making deliberate factual misrepresentations and omissions to the Juvenile Court.

The Court finds that Ms. Cunningham did not violate the Jensens' constitutional rights by failing to investigate the representations of Drs. Wagner and Corwin. The Jensens' claims have important similarities to the Eighth Circuit case of *Thomason v. SCAN Volunteer Services, Inc.*[94] The plaintiff in *Thomason* brought a substantive due process claim against a state social worker for violation of her right to "the care, custody and management" of her infant child.[95] The social worker received a report from a doctor who was treating the plaintiff's child, including two letters and an article from the *Journal of Pediatrics*, which stated his concern that the plaintiff might be suffering from a psychological disorder that causes her to partially suffocate her child in order to garner the attention of health care professionals.[96] Without investigating the allegations, the social worker removed the child from the plaintiff's custody and "arguably mischaracterized" the doctor's report in an affidavit to the juvenile court.[97] The Eighth Circuit held that the social worker's failure to investigate did not violate the parent plaintiff's constitutional rights where she relied on the doctor's "reasonable suspicion that life-threatening abuse [was] occurring in the home."[98]

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[94]85 F.3d 1365 (8th Cir. 1996).

[95]*Id.* at 1370.

[96]*Id.* at 1368.

[97]*Id.* at 1372.

[98]*Id.* at 1373.

Similar to the social worker in *Thomason*, Ms. Cunningham relied on the information provided to her by P.J.'s treating physician in filing the Verified Petition. The Jensens have produced no evidence that Ms. Cunningham had reason to suspect the information and opinions given to her by Drs. Wagner and Corwin were misleading. Rather, the Jensens contend that if Ms. Cunningham would have fulfilled her duties under Utah law to investigate P.J.'s referral, she would have discovered the misrepresentations and omissions allegedly made to her by the doctors. However, any duty to investigate that Ms. Cunningham may have had under State law cannot form the basis of a § 1983 claim for violation of substantive due process.[99]

In this emergency situation, like the one in *Thomason*, Ms. Cunningham was reasonable in relying on the information provided to her by the doctors, even in the absence of any further investigation. Dr. Wagner communicated to Ms. Cunningham that P.J.'s situation was a medical emergency and that P.J.'s life was in danger, thus implicating the State's compelling interest in P.J.'s safety. The means used by Ms. Cunningham to address the State's compelling interest in the emergency medical situation were narrowly tailored. Ms. Cunningham did not seek to immediately remove P.J. from the home. Rather, she filed the Verified Petition, thus instituting a state court proceeding where the Jensens would have an opportunity to rebut the doctor's allegations. If the situation had been represented to Ms. Cunningham as something less than an urgent medical emergency, perhaps a duty to investigate could be constitutionally required. Such a duty may be needed in non-emergency situations in order to curb "overzealous suspicion and intervention on the part of health care professionals and government officials," which "may have

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[99]*See Jones v. City and County of Denver*, 854 F.2d 1206, 1209 (10th Cir. 1988) ("Section 1983 does not, however, provide a basis for redressing violations of *state* law, but only for those violations of *federal* law done under color of state law.").

the effect of discouraging parents and care takers from communicating with doctors or seeking appropriate medical attention for children with real or potentially life-threatening conditions."[100] However, there is nothing in the record to suggest that Ms. Cunningham did not reasonably believe the doctors' contentions that P.J.'s life was in danger and immediate action was necessary to ensure his welfare. Accordingly, the Court finds that the Jensens have not established a constitutional violation of either their right to familial association or their right to direct P.J.'s medical care with respect to Ms. Cunningham's actions in failing to investigate P.J.'s referral and in filing the Verified Petition.

The Court also finds that the Jensens have not established a constitutional violation based on Ms. Cunningham's alleged misrepresentations and omissions to the Juvenile Court. As an initial matter, the Court notes that the Jensens have failed in their opposition memorandum to point out the specific factual misrepresentations and omissions on which they base their claim against Ms. Cunningham. As the Jensens bear the burden of establishing a constitutional violation of the their substantive due process rights, this failure alone entitles Ms. Cunningham to qualified immunity.[101]

Nonetheless, having carefully reviewed their opposition memorandum, the Jensens appear to base their substantive due process claims on three instances in which they contend Ms. Cunningham made factual misrepresentations and omissions to the Juvenile Court: (1) the Verified Petition; and (2) an August 8, 2003 affidavit; and (3) an August 18, 2003 affidavit. The

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[100] *Thomason*, 85 F.3d at 1373.

[101] "Judges are not like pigs, hunting for truffles buried in briefs." *U.S. v. Griebel*, 2008 WL 1741503, * 4 (10th Cir. Apr. 14, 2008) (quoting *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1996)).

Jensens have not brought forth any evidence that Ms. Cunningham knew that the information contained in the Verified Petition was misleading or deficient. As outlined above, Ms. Cunningham had no constitutional duty to investigate the information provided her by PCMC doctors before filing it. Thus, Ms. Cunningham's statements in the Verified Petition do not establish a violation of the Jensens' substantive due process rights. Accordingly, the Jensens' substantive due process claims depend entirely on the misrepresentations and omissions allegedly made by Ms. Cunningham in her August 2003 affidavits.

Assuming the Jensens' version of the facts, the "misrepresentations and omissions" made by Ms. Cunningham in her August 2003 affidavits do not establish a constitutional violation. The Jensens claim that Ms. Cunningham made the following misrepresentations and omissions in both her August 8 and August 18 affidavits: (1) stating that a sample of P.J.'s tumor was sent to Dana-Farber for a second opinion without stating that the second opinion was never given; (2) stating that P.J. underwent a CT and Bone Scan without stating that these tests were normal; (3) stating that the Jensens wanted to use IPT to treat P.J. when they were actually no longer interested; (4) omitting to state that the "controlling" genetic tests were not yet complete; (5) omitting to state that she had not actually spoken with Dr. Coffin; (6) referring to Dr Birkmayer as a man rather than as a doctor; and (7) stating that Dr. Tishler recommended in the July 28, 2003 hearing that P.J. should begin chemotherapy when Dr. Tishler had actually reserved his final opinion until all the testing was complete.

Upon close inspection of the circumstances in which Ms. Cunningham submitted her August 2003 affidavits, the alleged misrepresentations and omissions were of little, if any, consequence. Of the alleged misrepresentations and omissions listed above, only numbers 4 and

7 have any potential significance. However, the record clearly reveals that they cannot support the Jensens' claims.

In the hearing held on July 28, 2003, the Juvenile Court clearly ordered that P.J. begin chemotherapy by August 8, 2003. The Jensens did not begin P.J.'s chemotherapy by that date. Ms. Cunningham's August 2003 affidavits were submitted with the State's application to take P.J. into protective custody as a result of the Jensens' failure to begin P.J.'s chemotherapy.

The hearing transcript shows that Dr. Tishler did in fact recommend that P.J. begin chemotherapy at the July 28 hearing and that any burden to place further test results before the Juvenile Court was on the Jensens. At the July 28 hearing, Mr. Nakamura clearly advocated the Jensens' concern that some of the testing was not yet completed. Dr. Tishler indicated that there was no question that P.J. had a malignant tumor that would require chemotherapy and that the remaining pathological and radiological tests would merely serve to clarify what type of tumor he had. Upon hearing and accepting this, the Juvenile Court ordered that P.J.'s chemotherapy be commenced before August 8, 2003, without regard to the test results. The Juvenile Court also stated in the July 28 hearing that should the test results indicate that chemotherapy was not needed, the Jensens were free to bring that to the court's attention. Thus, numbers 4 and 7 were not misrepresentations or omissions at all, as demonstrated by the hearing transcript itself.

The other alleged misrepresentations and omissions were plainly immaterial. Numbers one, two, and three are listed in Ms. Cunningham's August 18 affidavit as information provided to her by Dr. Wagner around June 16, 2003. Although this information provided useful background information, it was clearly not material to the issues before the Juvenile Court in mid-August 2003. Those issues centered on the Jensens' failure to comply with the Juvenile Court's order that P.J. begin chemotherapy by August 8, 2003. With respect to number 5, Ms.

Cunningham did not state that she spoke with Dr. Coffin. Rather, she merely states that according to Dr. Coffin, the Jensens had Dr. Christensen do a second oral surgery on P.J.'s mouth resulting in an additional sample that was sent to the University of Washington—a fact that the parties do not dispute. Finally, and exemplary of the "misrepresentations and omissions" the Jensens allege Ms. Cunningham made, Ms. Cunningham's reference to Dr. Birkmayer as a man rather than a doctor was not material to the matters before the Juvenile Court at that time.

The Court finds that the misrepresentations and omissions allegedly made by Ms. Cunningham were completely immaterial to the issues before the Juvenile Court and, therefore, did not interfere with the Jensens' substantive due process rights, even under the compelling interest/narrowly tailored standard.[102] As outlined above, Ms. Cunningham instituted process before a State court of competent jurisdiction to adjudicate the claim of medical neglect against the Jensens. In this proceeding, the Jensens' fundamental rights to direct the custody, care, and control of their son were carefully balanced by a neutral judge. There is simply insufficient evidence that Ms. Cunningham deliberately misrepresented or omitted material facts to the Juvenile Court.

Mr. Anderson. The Jensens allege that Mr. Anderson violated their rights to familial association and to direct P.J.'s medical care by (1) interfering with their ability to select their doctors; (2) refusing to withdraw the Verified Petition; (3) intentionally failing to disclose material facts to the Juvenile Court; and (4) failing to properly train and supervise DCFS case workers. The Court finds the Jensens have not established that Mr. Anderson violated their substantive due process rights.

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[102]Accordingly, the Court also finds that Ms. Cunningham's actions did not violate the Jensens' substantive due process rights under the undue burden and shocks the conscience tests.

First, the Jensens claim that Ms. Anderson violated their right to direct P.J.'s medical care by insisting that the State select the doctor who would treat P.J. According to the Jensens, a parent is entitled to choose the doctor who will provide medical treatment to their child as long as the alternatives are reasonable. They contend that Mr. Anderson "took the position that the State could force the parents to go to the court and let the court decide which physician was 'better,'"[103] thus preventing the Jensens from placing P.J. under the care of either Dr. Birkmayer or Dr. Simone.

The Court finds, based on the circumstances of the case, that this does not amount to a constitutional violation of the Jensens' right to direct P.J.'s medical care. Mr. Anderson's involvement with P.J.'s case did not begin until late August 2003. By this time, the Juvenile Court had already held a number of hearings to determine the medical care that was in P.J.'s best interest. To that end, the Juvenile Court ordered P.J. to begin chemotherapy administered by a board-certified pediatric oncologist by August 8, 2003. The Jensens did not meet this deadline and the Juvenile Court granted protective custody of P.J. to the State. It was at this point that Mr. Anderson become involved in the case, attempting to negotiate a mutually agreeable solution. In his negotiations, Mr. Anderson took the position that P.J. must be treated with chemotherapy by a board-certified pediatric oncologist. This position was in accord with both the Juvenile Court's order and the opinion of Dr. Tishler who had evaluated P.J. Most important, as even the Jensens' acknowledge, Mr. Anderson's position was that if the Jensens wanted a different doctor, they could make their request to the Juvenile Court. The Juvenile Court was readily available to hear and determine whether the Jensens' desire to have a different doctor treat P.J. was in his best

[103]Docket No. 340, at 9.

interest. In light of these undisputed facts—particularly the fact that the negotiations were conducted during the course of the Juvenile Court proceedings, which provided ample process—Mr. Anderson's "position" that having a board-certified pediatric oncologist treat P.J. was in his best interest was narrowly tailored to serve the State's compelling interest in protecting P.J. Accordingly, such does not amount to a constitutional violation.

The Jensens also allege that Mr. Anderson violated their constitutional rights by refusing to withdraw the medical neglect allegations despite his admission that the Jensens were not neglectful parents. The Jensens base this assertion on their depositions, in which they testified that during negotiations with Mr. Anderson in late August 2003, Mr. Anderson said, "I understand you're a great parent. I can see that, but we can't let you go. We can't have it over. It's gone too far."[104] The Jensens ask the Court to infer from this that Mr. Anderson knew the Jensens were not guilty of medical neglect but chose to maintain the Verified Petition anyway for political reasons.

These statements do not establish a violation of the Jensens' substantive due process rights. The negotiations between the Jensens and Mr. Anderson began in late August 2003, after the Juvenile Court had already granted protective custody of P.J. to the State and ordered that he undergo chemotherapy to treat the cancer that multiple medical professionals indicated he had. Mr. Anderson traveled to Idaho in an attempt to negotiate an amiable resolution with the Jensens. The above statements were allegedly made during the course of these negotiations. Upon this background of undisputed facts, the Court cannot reasonably infer from Mr. Anderson's alleged statements that the medical neglect allegations were baseless, that Mr. Anderson knew it, and

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[104]Docket No. 345, at ¶ 382.

that he admitted as much to the Jensens. Mr. Anderson's attempt to negotiate a workable solution to the out-of-hand situation in no way interfered with the Jensens' right to familial association or their right to direct P.J.'s medical care.

The Jensens also allege that Mr. Anderson violated their substantive due process rights by intentionally failing to inform the Juvenile Court of the following: (1) definitive testing had never been performed on P.J.'s tissue; and (2) Dr. Johnston had materially breached his agreement to refrain from rendering a diagnosis before completing the independent testing.

These allegations provide neither a factual nor legal basis to find that Mr. Anderson violated the Jensens' substantive due process rights. With regard to first alleged omission, the Jensens have not directed the Court to evidence that Mr. Anderson knew the Juvenile Court was unaware of the possibility for genetic testing or that genetic tests were "definitive." Rather, they cite to the deposition testimony of P.J.'s guardian ad litem in which she indicates that *she* was unaware of the possibility for genetic testing until September 4, 2003. This does not show that Mr. Anderson intentionally withheld information about genetic testing from the Juvenile Court. Moreover, the Jensens repeatedly stated their desire for further testing during the Juvenile Court proceedings.

With respect to the second alleged omission, the Jensens contend that Mr. Anderson was aware that Dr. Johnston had determined to recommend chemotherapy before receiving the results of the genetic tests in violation of the September 5, 2003 stipulation and that Mr. Anderson failed to inform the Juvenile Court of this fact. Mr. Anderson testified that he understood Dr. Johnston would perform an independent evaluation of P.J.'s medical condition, including independent testing, before rendering a final treatment recommendation. Mr. Anderson also testified that he was aware the genetic tests were not finished when Dr. Johnston determined to recommend

chemotherapy. However, there is no evidence that Mr. Anderson understood that rendering a diagnosis before completion of the genetic testing breached the September 5 stipulation. The deposition testimony cited by the Jensens only refers to "independent testing."[105] There is no indication in either Mr. Anderson's testimony, or in the written stipulation, that Dr. Johnston could not have sufficiently confirmed the diagnosis through independent testing, like the pathological testing conducted by Dr. Coffin, even though the genetic testing was not complete. Moreover, there is no evidence showing that Mr. Anderson intentionally withheld the fact that the genetic testing was incomplete from the Juvenile Court. The Court cannot find that Mr. Anderson was deliberately withholding information from the Juvenile Court based merely on the fact that he knew the genetic tests—which Dr. Johnston testified were immaterial to his treatment recommendation—were not yet complete. Most important, the Jensens have failed to show how Mr. Anderson's alleged failure to disclose this information interfered with their right to direct P.J.'s medical care. The Jensens refused to follow Dr. Johnston's treatment recommendations, which lead to DCFS's decision to dismiss the case shortly thereafter. The only action taken by the Juvenile Court subsequent to Dr. Johnston's recommendation was to dismiss the case.

Finally, the Jensens argue that Mr. Anderson should be liable for failure to adequately train and supervise DCFS case workers. Presumably, although it is far than clear, the Jensens claim that Mr. Anderson is liable for the injuries resulting from Ms. Cunningham's actions in failing to properly investigate P.J.'s referral because he failed to train her. The Jensens cite to the case of *City of Canton v. Harris*[106] for the proposition that a supervisor who acts with deliberate

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[105]Docket No. 345, Ex. 2, at 249.

[106]489 U.S. 378 (1989).

indifference in failing to train and supervise subordinates is subject to liability under section 1983.

The Jensens' failure to train and supervise claim fails for two reasons. First, the Jensens have not brought any evidence to the Court's attention that could show Mr. Anderson acted with "deliberate indifference"[107] to the rights of others in failing to train Ms. Cunningham. Second, the Jensens have not established that Ms. Cunningham's conduct violated their constitutional rights, a prerequisite to Mr. Anderson's liability for failure to train her.[108]

In sum, the Court finds that none of Mr. Anderson's actions during his involvement with P.J.'s case interfered with the Jensens' substantive due process rights.

2. Procedural Due Process

The Jensens claim that each of the Defendants violated their procedural due process rights. Ms. Cunningham, Ms. Eisenman, and Mr. Anderson present argument on these claims. Dr. Wagner incorporates these arguments by reference. However, as Ms. Eisenman and Dr. Albritton enjoy absolute immunity, the Jensens' procedural due process claims against them are not discussed.

Ms. Cunningham. The Jensens claim that Ms. Cunningham violated their procedural due process rights by failing to properly investigate P.J.'s referral and by intentionally misrepresenting facts to the Juvenile Court.

At its most basic level, due process ensures that a person may not be deprived of an interest in life, liberty, or property without "the opportunity to be heard at a meaningful time and

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[107] *Id.* at 388.

[108] *Id.* at 391.

in a meaningful manner."[109] As noted by the Court in its June 2006 Decision, the Due Process Clause also requires that "the notice and hearing . . . be fair."[110] Accordingly, in considering the Defendants' motions to dismiss in June 2006, the Court found that the Jensens' allegation that "[Ms. Cunningham] intentionally misrepresented or omitted facts in the Jensens' case, including the status of allegedly confirmatory tests, to the Utah juvenile court" was sufficient to state a claim for violation of their rights to procedural due process.[111]

However, as set forth above, the Jensens have failed to submit evidence that Ms. Cunningham deliberately made material misrepresentations and omissions to the Juvenile Court. Rather, the Jensens merely nitpick Ms. Cunningham's August 2003 affidavits. These alleged misstatements are not the type of intentional falsities that would render an otherwise procedurally sound judicial proceeding "unfair."[112] Rather, these misrepresentations, which dealt with facts known to the Jensens, were more properly addressed by the Jensens' counsel at the August 8, 2003 hearing before the Juvenile Court. For example, the Jensens' counsel could, if desired, easily have pointed out to the Juvenile Court that Dr. Birkmayer was more than just a "man." Thus, the Jensens have not established a violation of their procedural due process rights with regard to the alleged factual misrepresentations and omissions.

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[109]*Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (internal quotation marks omitted).

[110]Docket No. 52, at 23 ("[T]he Due Process Clause also encompasses . . . a guarantee of *fair* procedure.") (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)) (internal quotation marks omitted).

[111]*Id.*

[112]*See, e.g., Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) (finding due process violation where witness gave perjured testimony that he had received no promise in return for his testimony when in reality he had).

Additionally, the Court finds that the Jensens' had no liberty interest in the investigation of child abuse claims required of DCFS case workers under Utah law and, therefore, cannot establish a violation of their procedural due process rights by virtue of Ms. Cunningham's failure to carry out that investigation. "Protected liberty interests may arise from two sources—the Due Process Clause itself and the laws of the States."[113] A State may create a liberty interest "by establishing substantive predicates to govern official decision-making . . . and by mandating the outcome to be reached upon a finding that the relevant criteria have been met."[114] Both of these elements are necessary for the creation of a liberty interest. Thus, where state law requires the fulfilment of specified substantive predicates but does not mandate a certain outcome, there is no liberty interest.[115]

"State-created procedures . . . do not create such an entitlement where none would otherwise exist."[116] As stated by the Supreme Court: "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."[117] For example, in *Pierce v. Delta County Department of Social Services*, the plaintiffs argued that Colorado's Child Protection Act created a liberty interest by mandating

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[113]*Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 461 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)) (internal quotation marks omitted).

[114]*Id.* at 462 (quoting *Hewitt*, 459 U.S. at 472) (internal quotation marks omitted).

[115]*Id.* at 464-465.

[116]*Pierce v. Delta County Dept. of Soc. Servs.*, 119 F. Supp. 2d 1139, 1152-53 (D. Colo. 2000).

[117]*Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

that acts of child abuse be reported and properly investigated.[118] The court rejected this contention, finding that the Colorado statutes at issue merely mandated procedure without dictating "a particular substantive outcome or guarantee."[119]

The Jensens contend that Utah law, by statue, imposes mandatory duties to perform specific investigative actions before doing anything that might affect parental rights. Even assuming that this is the case, the Jensens merely assert a liberty interest in process, not in substantive outcomes. The Jensens do not point to any section of the Utah Code that sets forth a specific substantive predicate that, when fulfilled, dictates a specific *substantive* outcome. This does not create the sort of entitlement protected by the Due Process Clause.

Thus, the Jensens have failed to establish that Ms. Cunningham violated their procedural due process rights.

Mr. Anderson. The Jensens claim that Mr. Anderson implemented a policy whereby case workers would not investigate allegations of medical neglect when made by doctors from PCMC and that this policy violated their due process rights.[120] The Jensens also claim that this policy violated their right to equal protection. However, because they did not plead an equal protection claim, and apparently asserted it for the first time in the summary judgment briefing, the Court will not consider this argument.

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[118]*Pierce*, 119 F. Supp. 2d at 1153.

[119]*Id.*

[120]At some point, the Jensens also claimed that Mr. Anderson made factual misrepresentations and omissions to the state courts. However, the Jensens have not pursued this theory in their summary judgment briefing and have submitted no evidence to support it.

The Jensens have failed to submit any evidence that DCFS actually had a policy of not investigating medical neglect allegations if they were made by PCMC doctors. Rather, the Jensens ask the Court to infer that such a policy was instituted by Mr. Anderson based on the following: (1) Ms. Cunningham did not investigate P.J.'s referral; (2) Ms. Cunningham testified that she believed her actions were consistent with DCFS policy; and (3) Ms. Cunningham testified that Mr. Anderson told her she handled P.J.'s case appropriately. This evidence is simply not enough to show that DCFS had a policy of never investigating medical neglect allegations made by PCMC doctors. Ms. Cunningham's alleged failure to investigate P.J.'s referral took place in a situation that was represented to her by Dr. Wagner as a medical emergency requiring prompt action. To the extent that her alleged failure to investigate did represent DCFS policy, it merely shows that DCFS policy allowed case workers to file a custody petition with a juvenile court of competent jurisdiction without further investigation when presented with objectively reasonable allegations of emergency medical neglect made by a doctor charged with the child's medical care. As explained in detail above, such a policy would not violate a parent's rights under the Due Process Clause. Moreover, even if DCFS did have a policy of never investigating referrals submitted by PCMC doctors, such a policy did not harm the Jensens in P.J.'s emergency case. Thus, the Court finds the Jensens have failed to establish that Mr. Anderson violated their procedural due process rights.

Dr. Wagner. As the Jensens received ample notice and an opportunity to be heard, any procedural due process claims against Dr. Wagner must be based on his alleged misrepresentations and omissions. However, as set forth above, the Jensens have not submitted competent evidence that Dr. Wagner deliberately misrepresented or omitted material facts to the Juvenile Court or others involved in the case. Moreover, any misrepresentations and omissions

allegedly made by Dr. Wagner did not make the Juvenile Court proceedings unfair. The record demonstrates that the Jensens received ample opportunity to present their desire for further testing in the Juvenile Court. In fact, these desires were heard and decided upon by that court. The Jensens have not established that Dr. Wagner violated their procedural due process rights.

3. Malicious Prosecution

In their third cause of action, the Jensens[121] allege that each of the Defendants[122] violated their Fourth Amendment right to be free from unreasonable seizures by instituting and continuing a "malicious prosecution." Each of the Defendants has moved for summary judgment on this claim. Notably, the Jensens have failed to respond to Mr. Anderson's motion on this point. Accordingly, the Court will grant his motion with respect to the Fourth Amendment claim.

Under Tenth Circuit law, analysis of a § 1983 claim for malicious prosecution in violation of the Fourth Amendment is guided by the elements of the common law tort of malicious prosecution.[123] However, "the ultimate question in such a case is whether plaintiff has proven the deprivation of a constitutional right."[124] As recently stated by the Tenth Circuit in *Wilkins v. DeReyes*,

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[121]As the Court dismissed P.J.'s Fourth Amendment claim in its June 2006 Order, Mr. and Ms. Jensen proceed without him on this claim.

[122]The Jensens' malicious prosecution claims against Ms. Eisenman and Dr. Albritton are not discussed in light of their absolute immunity.

[123]*Becker v. Kroll*, 494 F.3d 904, 913-14 (10th Cir. 2007).

[124]*Wilkins v. DeReyes*, 528 F.3d 790, 797 (10th Cir. 2008) (quoting *Novitsky v. City of Aurora*, 491 F.3d 1244, 1257-58 (10th Cir. 2007)) (internal quotation marks omitted).

> Under our cases, a § 1983 malicious prosecution claim includes the following elements: (1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages.[125]

The Jensens seek damages for malicious prosecution arising from both the Juvenile Court proceedings and the criminal case.

a. Juvenile Court Proceedings.

To establish a § 1983 claim for malicious prosecution under the Fourth Amendment, the plaintiff must show that a seizure actually occurred.[126] In *Becker v. Kroll*, the Tenth Circuit considered a § 1983 plaintiff's claim that she was seized within the meaning of the Fourth Amendment even though she "was never arrested, incarcerated, or otherwise placed under the direct physical control of the state."[127] The plaintiff—who was charged with a felony offense in a state court—argued that investigation into her alleged criminal activity "imposed burdens on her time, finances, and reputation by requiring her to travel to and attend meetings, pay legal costs, and eventually, face criminal charges" and, therefore, constituted a seizure for Fourth Amendment purposes.[128] The court declined "to expand Fourth Amendment liability in cases where the plaintiff has not been arrested or incarcerated."[129] Specifically, the court noted that were it to impose Fourth Amendment liability in cases that lacked a traditional seizure, "every

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[125] *Id.* at 799.

[126] *Becker*, 494 F.3d at 914.

[127] *Id.* at 915.

[128] *Id.* at 914.

[129] *Id.* at 915.

charging decision would support a § 1983 malicious prosecution-type claim no matter the context."[130]

It is undisputed that neither Mr. Jensen nor Ms. Jensen was arrested, incarcerated, or otherwise placed under the direct physical control of the State as a result of the proceedings in the Juvenile Court. Recognizing this, the Jensens argue that the Court should expand the Fourth Amendment concept of "seizure" to accord with that proposed in Justice Ginsberg's concurrence in *Albright v. Oliver*.[131] The Jensens contend that they suffered "significant, ongoing deprivation[s] of liberty as a result of the Juvenile Court proceedings," which constitute a seizure under the Fourth Amendment, as follows:

> The Jensens were unable to return to the state of Utah (their home) without the threat of arrest and removal of their child. They were unable to take their child for an evaluation in Houston, and to other physicians of their choosing, because the State forbid it. They were subjected to mandatory court appearances. They were ordered to give up their passports. [Mr. Jensen] lost his job, and was exposed to serious diminishment of other employment prospects, both because he was terminated from his previous job, and because he had to devote his time, finances, energy and efforts to attempting to protect his and his family's rights. The Jensens were subjected to close media scrutiny and held up to public ridicule and contempt. Finally, the Jensens endured the horrible financial and emotional strain of defending their family from neglect proceedings that were based entirely upon misrepresentations and deceit.[132]

Although acknowledging the burdens experienced by the Jensens in defending themselves, the Court simply cannot find that they experienced a Fourth Amendment seizure as a result of the Juvenile Court proceedings. Tenth Circuit precedent clearly mandates the contrary.

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[130]*Id.*

[131]510 U.S. 266 (1994).

[132]Docket No. 342, at 15-16.

Accordingly, the Court finds that the Jensens have failed to establish a Fourth Amendment violation related to the Juvenile Court proceedings.

b. Criminal Case

With regard to the criminal case, the Defendants focus their challenges on the first and third prongs above: causation and probable cause. Because it is clear that neither Dr. Wagner nor Ms. Cunningham caused the prosecution of the criminal action against the Jensens, analysis of probable cause is unnecessary.

In order to establish a constitutional violation, the Jensens must show that Dr. Wagner and Ms. Cunningham "caused the plaintiff's continued confinement or prosecution."[133] In *Pierce*, the Tenth Circuit held that this element reaches more than just those who actually initiate a criminal action.[134] Surveying both the common law and cases interpreting the reach of the Fourth Amendment, the court concluded that a forensic analyst who fabricated inculpatory evidence and withheld exculpatory evidence, thereby leading prosecutors to indict and prosecute" the plaintiff, sufficiently caused the plaintiff's continued prosecution for purposes of the plaintiff's § 1983 claim, even though she did not formally initiate the charges.[135] In each of the examples used by the *Pierce* court to reach this conclusion, the state actor's conduct was closely connected to either the initiation or continuation of the prosecution.[136] Notably, the

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[133] *Wilkins*, 528 F.3d at 799.

[134] *Pierce*, 359 F.3d at 1291-92.

[135] *Id.* at 1291-94.

[136] *Id.* at 1292 ("[A] private person who takes an active part in *continuing or procuring the continuation of criminal proceedings initiated by himself or by another* is subject to the same liability for malicious prosecution as if he had initiated the proceedings.") (citing Restatement (Second) Torts § 655); *id.* (citing *Robinson v. Maruffi*, 895 F.2d 649, 655-56 (10th Cir. 1990)

principles described by the *Pierce* court closely resemble the definition of a complaining witness provided in *Anthony v. Baker*[137] for purposes of determining the applicability of prosecutorial immunity: "The term 'complaining witness' describes the person (or persons) who actively instigated or encouraged the prosecution of the plaintiff."[138]

The Court finds that Dr. Wagner did not cause the initiation or continued prosecution of the criminal case. The Jensens' claims with regard to Dr. Wagner relate entirely to information provided to DCFS, its representatives, Ms. Eisenman, and the Juvenile Court. In fact, Dr. Wagner moved to Ohio in late June 2003 during the pendency of the Juvenile Court proceedings and before any change in P.J.'s legal custody. Dr. Wagner's final involvement with the Juvenile Court proceedings was his execution of an affidavit dated July 22, 2003, outlining basically the same information provided previously to DCFS in his case summary. Dr. Wagner executed the affidavit at Ms. Eisenman's request. The affidavit was to be used in connection with the Juvenile Court proceedings. There is no evidence that Dr. Wagner ever had contact with anyone from the District Attorney's Office. Initiation and continuation of the criminal case were dependant on multiple intervening events, including, most notably, the Jensens failure to comply with the Juvenile Court's orders. Thus, Dr. Wagner did not cause the initiation or continuation of the

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(finding "sufficient evidence for the jury to find that the [defendant police officers] purposefully concealed and misrepresented material facts to the district attorney which may have influenced his decision to prosecute [the plaintiff]")); *id.* ("If police officers have been instrumental in the plaintiff's continued confinement or prosecutions, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors, or magistrates to confine or prosecute him.") (quoting *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988)).

[137]955 F.2d 1395 (10th Cir. 1992).

[138]*Id.* at 1399 n.2.

criminal case based solely on his referral of P.J.'s case to DCFS and his limited participation in the Juvenile Court proceedings.

The Court likewise finds that Ms. Cunningham did not cause the initiation or continued prosecution of the criminal case. The Jensens argue that Ms. Cunningham's participation in the criminal case is shown by the fact that her name appears on the probable cause statement on which the criminal charges were based and that Ms. Eisenman testified that Ms. Cunningham provided information to Officer Peterson, who authored that statement. Even if this were true,[139] it does not provide an evidentiary basis on which the Court could conclude that Ms. Cunningham caused the prosecution of the criminal case. The Jensens do not indicate what information Ms. Cunningham may have provided nor its relevance to the criminal charges—nor do they indicate the circumstances in which Ms. Cunningham provided the information. Accordingly, the Court finds the Jensens have failed to establish that Ms. Cunningham caused the initiation or continuation of the criminal prosecution.

The Jensens argue that the Court should apply principles of concurrent causation to hold all of the Defendants liable for the malicious prosecution. In the § 1983 context, "[w]here multiple forces are actively operating . . . plaintiffs may demonstrate that each defendant is a concurrent cause by showing that his or her conduct was a substantial factor in bringing [the injury] about."[140] Where concurrent causation is established, the burden of proof shifts to each

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[139]In reality, the Court cannot assume Ms. Eisenman so testified because the deposition pages cited by the Jensens were left out of their exhibits, despite receiving an opportunity to supplement the record. *See* Docket No. 375 (ordering the Jensens to provide any materials inadvertently omitted from their exhibits).

[140]*Lippoldt v. Cole*, 468 F.3d 1204, 1219 (10th Cir. 2006) (quoting *Northington v. Marin*, 102 F.3d 1564, 1568-69 (10th Cir. 1996)) (internal quotation marks omitted).

defendant to prove that his conduct was not the cause of the harm.[141] Should a defendant fail to do so, he is liable for the whole injury under principles of joint and several liability.[142]

The Jensens have not shown that principles of concurrent causation should apply to their Fourth Amendment claim. The Jensens have not submitted any evidence that Dr. Wagner or Ms. Cunningham provided information to the District Attorney's Office or that their involvement in the Juvenile Court case led to the initiation or continuation of the criminal charges. In fact, this is not even consistent with the Jensens' version of the facts: "Eisenman was driving the criminal charges effort, not McDonald or Cunningham."[143] Accordingly, there is no evidentiary basis on which to apply principles of concurrent causation and joint and several liability to the Jensens' claim for malicious prosecution of the criminal case. Therefore, the Court finds that the Jensens have not established that Dr. Wagner and Ms. Cunningham violated their Fourth Amendment rights.

D. State Law Claims

The Court does not have original jurisdiction over any of the Jensens' state law claims. As this Order disposes of all of the Jensens' federal claims, and as their Utah constitutional claims present important questions of state law, the Court declines to further exercise supplemental jurisdiction over the state law claims and will remand them to the Third Judicial District Court for Salt Lake County, State of Utah, from which this case was removed.[144]

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[141] *Northington*, 102 F.3d at 1568.

[142] *Id.* at 1569.

[143] Docket No. 342, at 20.

[144] *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988); 28 U.S.C. §§ 1367(c)(1), (2); 1447(c).

IV. CONCLUSION

For all of the reasons set forth above, it is hereby

ORDERED that Defendant Richard Anderson's Motion for Summary Judgment [Docket No. 324], Defendant Kari Cunningham's Motion for Summary Judgment [Docket No. 326], Defendant Susan Eisenman's Motion for Summary Judgment [Docket No. 329], and Defendants Wagner and Albritton's Motion for Summary Judgment [Docket No. 332] are GRANTED IN PART with respect to Claims 1, 2, and 3 of the Complaint. It is further

ORDERED that Defendant Susan Eisenman's Motion to Strike Plaintiffs' Consolidated Statement of Fact [Docket No. 349], Defendant Wagner's and Albritton's Motion to Strike References to P.J.'s Current Condition [Docket No. 353], Defendants Wagner's and Albritton's Motion to Strike Plaintiffs' Hearsay [Docket No. 356], and Defendant Wagner's and Albritton's Motion to Strike Plaintiffs' Attempts to Rebut Medical Evidence Without Expert Testimony [Docket No. 358] are DENIED AS MOOT. It is further

ORDERED that the Jensens' state law claims (Claims 5, 6, 7, 9, and 10) are REMANDED to the Third Judicial District Court for Salt Lake County, State of Utah. It is further

ORDERED that the Clerk of the Court is directed to close this case forthwith.

DATED September 22, 2008.

BY THE COURT:

TED STEWART
United States District Judge

United States District Court
District of Utah

D. Mark Jones
Clerk of Court

Louise S. York
Chief Deputy Clerk

September 22, 2008

Clerk of Court
Third Judicial District, Salt Lake County - Salt Lake City District Court
450 South State
P.O. Box 1860
Salt Lake City, UT 84114-1860

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Re: Jensen et al v. State of Utah et al
US District Court Case Number: 2:05-cv-00739-TS-PMW
State Case Number: 050912502

Dear Clerk of Court:

Pursuant to Order Remanding Case to State Court signed by the Honorable Ted Stewart and dated 9/22/2008, I am forwarding a certified copy of the remand order. None of the documents contained in the federal file will be forwarded to the State Court (see FRCP 28:1447).

I am also returning your original record received by the federal court on 09/29/2005

Please return a signed copy of this letter in the enclosed self-addressed envelope.

Sincerely,

D. Mark Jones, Clerk

By: /s/
Aaron Paskins
Deputy Clerk

Enclosures
cc: Counsel of record
FedEx Mail Receipt No.: 792754384489

ACKNOWLEDGMENT OF RECEIPT:

Received by: _____
Date: _____

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

BARBARA JENSEN vs. STATE OF UTAH

CASE NUMBER 050912502 Civil Rights

CURRENT ASSIGNED JUDGE
LESLIE A LEWIS

PARTIES

Plaintiff - BARBARA JENSEN

Plaintiff - DAREN JENSEN
Represented by: ROGER P CHRISTENSEN

2:05CV739 PGC

Defendant - STATE OF UTAH
PO BOX 14220
EAST OFFICE BLDG #E220
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Represented by: ROGER P CHRISTENSEN

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SALT LAKE CITY, UT 84111

Defendant - KARI CUNNINGHAM
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SALT LAKE CITY, UT 84103

Defendant - RICHARD ANDERSON
120 N 200 W #225
SALT LAKE CITY, UT 84103

Defendant - LARS WAGNER
3333 BURNET AVE
CINCINNATI, OH 45229

Defendant - DAVID L CORWIN
50 N MEDICAL DRIVE
SALT LAKE CITY, UT 84132

Defendant - CHERYL M COFFIN
50 N MEDICAL DRIVE
SALT LAKE CITY, UT 84132

Defendant - KAREN H ALBRITTON
50 N MEDICAL DRIVE
SALT LAKE CITY, UT 84132

Defendant - SUSAN EISENMAN
PO BOX 140811
SALT LAKE CITY, UT 84114

'COUNT SUMMARY

TOTAL REVENUE	Amount Due:	295.50
	Amount Paid:	295.50
	Credit:	0.00
	Balance:	0.00
BAIL/CASH BONDS	Posted:	300.00
	Applied:	0.00
	Forfeited:	0.00
	Balance:	300.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S

Amount Due:	155.00
Amount Paid:	155.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: JURY DEMAND - CIVIL

Amount Due:	75.00
Amount Paid:	75.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	17.50
Amount Paid:	17.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	16.00
Amount Paid:	16.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	16.00
Amount Paid:	16.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	16.00
Amount Paid:	16.00
Amount Credit:	0.00
Balance:	0.00

BAIL/CASH BOND DETAIL - TYPE: CASH BOND: Civil, Mi

Posted By:	CHRISTENSEN & JENSEN PC
Posted:	300.00
Forfeited:	0.00
Refunded:	0.00
Balance:	300.00

CASE NOTE

PROCEEDINGS

07-18-05	Case filed by teressah				teressah
07-18-05	Judge LEWIS assigned.				teressah
07-18-05	Filed: Complaint No Amount				teressah
07-18-05	Filed: Demand Civil Jury				teressah
07-18-05	Fee Account created	Total Due:	155.00		teressah
07-18-05	Fee Account created	Total Due:	75.00		teressah
07-18-05	COMPLAINT - NO AMT S	Payment Received:		155.00	teressah
	Note: Code Description: COMPLAINT - NO AMT S, JURY DEMAND - CIVIL				
07-18-05	JURY DEMAND - CIVIL	Payment Received:		75.00	teressah
07-18-05	Bond Account created	Total Due:	300.00		teressah
07-18-05	Bond Posted	Payment Received:		300.00	teressah
07-19-05	Fee Account created	Total Due:	17.50		paulo
07-19-05	COPY FEE	Payment Received:		17.50	paulo
07-20-05	Fee Account created	Total Due:	16.00		teressah
07-20-05	COPY FEE	Payment Received:		16.00	teressah
07-21-05	Fee Account created	Total Due:	16.00		evangelb
07-21-05	COPY FEE	Payment Received:		16.00	evangelb
08-12-05	Filed return: Affidavit of Service. To: Intermountain Health Care, INC.				salomet
	Party Served: Julie Swenson - Legal Assistant				
	Service Type: Personal				
	Service Date: August 08, 2005				
09-02-05	Filed: Defendant Susan Eisenman's Waiver of Service of Summons Pursuant to Utah Rule of Civil Procedure 4(f).				salomet
09-02-05	Filed: Defendant Richard Anderson's Waiver of Service of Summons Pursuant to Utah Rule of Civil Procedure 4 (f).				salomet
09-02-05	Filed: Defendant Richard Anderson's Waiver of Service of Summons Pursant toUtah Rule of Civil Procedure 4(f).				salomet
09-02-05	Filed: Defendant Kari Cunningham's Waiver of Service of Summons Pursuant to Utah Rule of Civil procedure 4(f)				salomet
09-02-05	Filed: Defendant Kari Cunningam's Waive of service of summons				

	pursuant to Utah rule of civil procedure 4(f)			salomet
)-02-05	Filed: Defendant State of Utah's waiver of service of summons pursuant Utah rule of civil procedure 4(f)			salomet
)-02-05	Filed: Defendant State of Utah's Waiver of service of summons pursuant Utah Rule of Civil prodedure 4(f).			salomet
)-02-05	Filed: Defendant Susan Eisenman's waiver of servcie of summons pursuant to Utah Rule of Civil procedure 4(f).			salomet
)-02-05	Fee Account created	Total Due:	16.00	teressah
)-02-05	COPY FEE	Payment Received:	16.00	teressah
)-06-05	Filed: Notice of Removal to Federal Court.			salomet
)-09-05	Filed: Waiver and Acceptance of Service			wendyd
)-09-05	Filed: Waiver and Acceptance of Service			wendyd
)-09-05	Filed: Waiver and Acceptance of Service			wendyd
)-09-05	Filed: Waiver and Acceptance of Service			wendyd
)-19-05	Case Disposition is Transferred			chells
	Disposition Judge is LESLIE A LEWIS			chells
)-19-05	Note: Case sent to Federal Court			chells

PEGGY E. STONE (6658)
PETER L. ROGNLIE (4131)
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IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

PARKER JENSEN, a minor, by and through his parents and natural guardians, BARBARA and DAREN JENSEN; BARBARA JENSEN, individually; and DAREN JENSEN, individually, Plaintiffs, v. STATE OF UTAH; INTERMOUNTAIN HEALTH CARE, INC.; KARI CUNNINGHAM, in her individual capacity; RICHARD ANDERSON, in his individual and official capacities; LARS M. WAGNER, in his individual capacity; DAVID L. CORWIN, in his individual capacity; CHERYL M. COFFIN, in her individual capacity; KAREN H. ALBRITTON, in her individual capacity; SUSAN EISENMAN, in her individual capacity; and JANE and JOHN DOE, in their individual capacities, Defendants.	**NOTICE OF REMOVAL TO FEDERAL COURT** Civil No. 050912502 Judge Leslie Lewis

Please take notice that on the 6th day of September, 2005, defendant Richard Anderson, by and through his counsel, Peter L. Rognlie, Peggy E. Stone and Reed M. Stringham, Assistant Utah Attorneys General, filed a *Notice of Removal of a Civil Action From State Court to Federal Court* in the above-captioned case to the United States District Court for the District of Utah, Central Division. A copy of said *Notice of Removal of a Civil Action From State Court to Federal Court* is attached hereto.

DATED this 06th day of September, 2005.

OFFICE OF THE UTAH ATTORNEY GENERAL

PEGGY E. STONE
PETER L. ROGNLIE
REED M. STRINGHAM
Assistant Utah Attorneys General
Attorneys for Richard Anderson

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **NOTICE OF REMOVAL TO FEDERAL COURT** was sent by United States mail, postage prepaid, this _____ day of September, 2005, to the following:

Roger P. Christensen
Karra J. Porter
CHRISTENSEN & JENSEN, P.C.
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Attorneys for Plaintiffs

David G. Williams
10 Exchange Place, 11 Floor
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